TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

No. 303

STELLA VAN OSTER, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS

FILED FEBRUARY 23, 1926

(31,716)

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 15, 1926

[fols. 1 & 2] [Caption omitted]

[fol. 3] **IN DISTRICT COURT OF FINNEY COUNTY**

No. 803. Cr.

THE STATE OF KANSAS, Plaintiff,

v.

(CLYDE BROWN) STELLA VAN OSTER, Defendant

NOTICE OF APPEAL—Filed June 11, 1925

To the State of Kansas, Plaintiff, and R. H. Calihan, County Attorney of Finney County, Kansas:

You are hereby notified that the defendant, Stella Van Oster, the claimant of the automobile in question in the above proceedings, hereby appeals from all rulings on the trial and from the judgment of the District Court of Finney County rendered against her, confiscating and forfeiting said car, on the 11th day of June, 1925, to the Supreme Court of the State of Kansas.

(Signed) Thompson & Thompson, Attorneys for Defendant, Stella Van Oster.

I hereby accept service of the above Notice of Appeal this 11th day of June, 1925, at Garden City, Kansas.

Ray H. Calihan, County Attorney of Finney County, Kansas.

[File endorsement omitted.]

[fol. 4] IN DISTRICT COURT OF FINNEY COUNTY

[Title omitted]

Journal Entries of Trial—Filed in Supreme Court July 3, 1925

ORDER MAKING STELLA VAN OSTER PARTY DEFENDANT

Now on this 11th day of June, 1925, being one of the days of the regular May 1925 Term of said Court, the above en-

titled action comes on for hearing in the proceedings to confiscate and forfeit the automobile, one certain Dodge touring automobile, Engine number A250395, seized by the Sheriff in this action, the plaintiff appearing by Ray H. Calihan, County Attorney, and the defendant Stella Van Oster appearing by William H. Thompson of the firm of Thompson & Thompson, her attorneys; and on application therefor the said Stella Van Oster was made a party defendant in this proceeding, and permitted to file her answer herein as the owner of said car.

Demurrer to Evidence, Motion to Dismiss, and Order Overruling Same

Thereupon evidence is introduced on the part of the State, to which the defendant demurs, and moves to dismiss the action, which demurrer and motion is by the Court overruled; the defendant thereupon introduced her evidence and rested.

Judgment

Thereupon, after argument of counsel, and being fully advised in the premises, the Court finds that the automobile in question is of the value of $700.00, and that it is a common nuisance, and adjudges the same to be forfeited, and orders the Sheriff of Finney County, Kansas, to sell the same at Public Sale, as required by Law.

Motion for New Trial and Order Overruling Same

Thereupon, defendant Stella Van Oster filed her motion for a new trial, which was by the Court overruled pro forma. Said defendant Stella Van Oster then gave notice of appeal in open Court, and the Court fixed the amount of the Appeal Bond in the sum of $1,400.00, and ordered that said bond be conditioned that if judgment be rendered against her on appeal that she would satisfy the same by paying the full value of said automobile, towit: the sum of

$700.00, into the Clerk of the District Court, which was ac-
[fols. 5-7] cordingly done; and said bond for $1,400.00 was duly executed and approved upon the payment of said $700.00 into the Clerk of the District Court, where the same is now on deposit, and held to abide the further order of the Court; to all of which adverse orders and rulings of the Court the defendant Stella Van Oster objected and excepted.

(Signed) C. E. Vance, District Judge.

Approved: (Signed) Ray H. Calihan, County Attorney.
——— ———, Attorneys for defendant Stella Van Oster.

Clerk's certificate to foregoing papers omitted in printing.

[File endorsement omitted.]

[fol. 8] IN SUPREME COURT OF KANSAS

No. 26584

STATE OF KANSAS, Appellee,

vs.

(CLYDE BROWN) and STELLA VAN OSTER, Appellant

Appellant's Abstract of Record from District Court of Finney County—Filed October 1, 1925

[Title omitted]

INFORMATION—Filed April 2, 1925

"STATE OF KANSAS,
Finney County, ss:

"I, Ray H. Calihan, the undersigned County Attorney of said county, in the name and by the authority and on behalf of the State of Kansas, come now here and give the Court to understand and be informed, that on the 28th day of March, A. D. 1925, in said County of Finney and State
[fol. 9] of Kansas, one Clyde Brown did then and there unlawfully have in his possession intoxicating liquors;

"2nd Count. The said defendant did in said county and state on the said 28th day of March, 1925, unlawfully transport intoxicating liquor from one place in Finney County, Kansas, to another place in said county and state;

"3rd Count. The said defendant did in said county and state barter and sell intoxicating liquors;

"4th Count. The said defendant did in said county and state barter and sell intoxicating liquors at a different time than that mentioned in the 3rd count of this information;

"5th Count. That on or about the said 28th day of March, 1925, in the County of Finney, State of Kansas, the said defendant did then and there unlawfully use one certain Dodge touring automobile, license No. —, Engine No. A250395, for the purpose of carrying and transporting intoxicating liquors from one place to another within the State of Kansas and County of Finney, and said automobile did thereby become a common nuisance, said use and transportation in said automobile being contrary to the laws of the State of Kansas in such cases made and provided, and all of the above and foregoing acts complained of being contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Kansas.

(Signed) Ray H. Calihan, County Attorney.

"Sworn to and filed April 2nd, 1925."

[fol. 10] "In District Court of Finney County

[Title omitted]

Answer of Defendant Stella Van Oster—Filed June 11, 1925

"Comes now Stella Van Oster, and for answer herein alleges: That she is the owner of the Dodge touring automobile, engine No. A250395, seized herein; that if the defendant, Clyde Brown, was driving said car or automobile at the time of the seizure, it was without the knowledge or authority of this answering defendant, and that if said

Clyde Brown had any intoxicating liquor in his possession at the time of the arrest and seizure of the car, it was without the knowledge, sanction or authority of this answering defendant, the owner of said car; that at the time of the searching and seizure of said car, March 28, 1925, no complaint or information had been filed charging said automobile to be a common nuisance, and no warrant had been issued authorizing the officer to arrest any person using the automobile in question, and the defendant, Clyde Brown, or any other person in said car did not have intoxicating liquor in his possession, and none was in said car, and none was found by the officers on the search of said car, and the seizure of said car was without authority of law, and was unreasonable, and in violation of the Fourth Amendment to the Constitution of the United States, against unreasonable searches and seizures, and the taking of said car in this proceeding by said officers in the manner as aforesaid, and the Act under which this proceeding is had, is unconstitutional in that it violates the Fourteenth Amendment to the Constitution of the United States by taking property without compensation and without due process of law.

[fol. 11] "That this answering defendant denies each and every material allegation of the information and warrant filed and issued herein.

"Wherefore, Stella Van Oster, the owner of the automobile, asks that she be made a party in the proceedings against said automobile, and that she be found to be the absolute, sole and only owner thereof, and that said automobile be discharged from the custody of the sheriff, and that she recover her costs herein and have such other and further relief as she may be entitled to in the premises.

Thompson & Thompson, Attorneys for Stella Van Oster.

In District Court of Finney County

Statement of Evidence

Ol. Brown testified:

He is sheriff of Finney County, Kansas. On the 28th day of March, 1925, took in his possession the Dodge (touring car) automobile in question; that he and Lee Richardson

followed the car into Garden City from about one and one-half miles east, and then through the streets of the city until they were in front of Henry Eichron's property on 4th street, when Richardson, from the running board of the car hollowed to Brown (the defendant) to stop, and witness crowded him over to the curb (Tr. 1).

They searched the car and Brown (the driver), but found nothing. Richardson walked back about fifteen steps from where the car stopped and picked up a bottle. "It was full practically up to that hole. It was poured out [fol. 12] of the bottle into that jug." (Tr. 2.) The bottle was broken, with a hole in it near the top, when it was handed to him. He took possession of the Dodge touring car, and it is now being held by him. The car number is set out in the information (Tr. 3).

He arrested Brown.

"Q. Are you able to state, with your experience with intoxicating liquor as an officer, if the bottle contained intoxicating liquor?

Mr. Thompson: I object, your Honor, unless he knows whether or not it is.

The Court: He ought to know. Objection overruled.

Mr. Calihan: You answered it was intoxicating liquor?

A. Yes, sir.

(Followed by an objection by defendant, which was disregarded by the Court.)

"Mr. Calihan: Did you see this bottle of liquor being thrown from the car?

A. No, I did not see it."

Cross-examination by Senator Thompson:

He searched the car but did not find any liquor of any kind in the car. He searched Mr. Brown (the driver) but did not find any intoxicating liquor on him. All he knew about liquor is what he saw in the broken bottle brought back by Richardson after he walked some distance back from where the car stopped, and later returned with the bottle. Witness did not see him pick it up, and did not [fol. 13] see Brown throw it out of the car. It was "about a pint of liquor" (Tr. 3 and 4). He did not taste the liquid.

"Q. And you do not know, as a matter of fact, whether it is intoxicating liquor or not?

A. I would swear that it is.

Q. How do you know?

A. By smell.

Q. Just by smell?

A. Yes, sir.

Q. You can tell by simply smelling if it is intoxicating liquor or not?

A. That is the way I have of telling.

Q. It could be told by tasting?

A. It could, I suppose.

Q. If one wants to risk his life?

A. I do not know about that. I never took a drop of liquor in my life.

Q. Never had a drop of intoxicating liquor?

A. Never had a drop of intoxicating liquor in my life.

Q. Do not know what it tastes like, and still you are willing to swear positively that it is intoxicating liquor?

A. Yes, sir.

Q. Are you willing to do it?

A. By smell." (Tr. 5).

Made a thorough search of the car. Mr. Brown had never been arrested before for any offense (Tr. 5). He took possession of the car without a warrant and none was [fol. 14] sworn out at the time of the arrest, and no warrant was sworn out until several days after. He took possession of the car without a warrant and without finding any liquor in the car or on his, Brown's, person (Tr. 7 and 8).

LEE RICHARDSON testified:

He was city marshal and deputy sheriff, was with Brown at the time in question. Saw Brown throw a small bottle out of the front door of the car.

"Was there anything in the bottle?

A. Full of liquor."

Picked it up about thirty-five feet from where the car stopped (Tr. 9).

"Q. Are you able to state from your experience as an officer if that is intoxicating liquor?"

Objected to as incompetent for the witness to attempt to so state.

Objection overruled or disregarded by the Court.

"A. I am able to state what it was.

Mr. Calihan: What would you state it was?

A. Intoxicating liquor" (Tr. 10).

Cross-examination by Senator Thompson:

Witness testified in the City Court when the case was tried against Clyde Brown. Did not remember saying that he did not see Clyde Brown throw anything from the car; and did not remember saying that he walked back two-[fol. 15] thirds to three fourths of a block from where the car stopped to pick up the bottle. (Tr. 10 and 11). Searched the car, nothing found in or about the car, and "never saw any intoxicating liquor," and nothing found on Mr. Brown. No one was with Mr. Brown. Was watching him closely all the time for a mile and a half. The first time he spoke to Brown was when he got on the running board of the car (Tr. 11 and 12).

Never tasted any of the liquor.

"Q. How do you know it was intoxicating?

A. My past experience in smelling it.

Q. Just simply smelling?

A. Yes, sir.

Q. Do not know anything about its contents as to its alcoholic contents?

A. Yes, sir, I know it's got alcohol.

Q. Or how much?

A. Do not know what per cent, but——

Q. Just smells like liquor?

A. Yes, sir, strong.

Q. Any test been made of it?

A. Only test I know of——

Q. Any chemical analysis?

A. I am not sure, I do not think there has been.

Q. And all you know is like the sheriff, by just smelling?

A. Smell and appearance, yes, sir" (Tr. 12 and 13).

"Q. A little less than a pint in the bottle?
A. When we got it" (Tr. 13).

[fol. 16] Clyde Brown was in business in Cimarron, handling tractors for Shepherd and Hedges (Tr. 14).

Offer in Evidence

The State introduced in evidence the bottle identified and its contents, over the objection of the defendant that it was incompetent, irrelevant and immaterial, and not shown to have been in the car at the time of the arrest and seizure, and not shown to have been on the person of the defendant, Clyde Brown; and for the further reason that the search and seizure was unlawful and unreasonable and in violation of the statute and Constitution of the State of Kansas, which requires a warrant, in cases of this kind, to be issued, and is in violation of the Constitution of the United States by reason of being an unreasonable seizure, and there being a failure on search to find evidence of liquor in the automobile in question or in possession of the defendant, Clyde Brown, which objection was overruled by the Court, except that the memorandum on the bottle was excluded from the evidence (Tr. 16).

Demurrer to Evidence, Motion to Dismiss, and Order Overruling Same

The defendant thereupon demurred to the evidence and moved to dismiss the action for the reason that the procedure was not in accordance with the statutes of the State of Kansas, and was in violation of the Constitution of the State of Kansas in that no warrant was issued authorizing or directing the officer or sheriff to arrest the defendant, Clyde Brown, and that the automobile had not been declared to be a common nuisance, and because there [fol. 17] had been no information filed charging the automobile to be a common nuisance, the seizure was unreasonable and in violation of the Constitution of the State of Kansas and the Constitution of the United States, particularly the 4th and 14th Amendments to the Constitution

of the United States; and for the further reason that there is a total lack of proof that there was any intoxicating liquor found in the car or about the car, or in the possession of the defendant, Clyde Brown, and that there is no proof that the liquor introduced in evidence and claimed to be found some distance away outside of the car is intoxicating liquor, which demurrer and motion was overruled by the Court (Tr. 17).

STELLA VAN OSTER testified:

She is the owner of the automobile in question, being a Dodge touring car 1925, engine number A250395 (Tr. 17). She purchased it from Shepherd and Hedges, September 27, 1924, for the sum of $950.00, and made all the payments on it except $100.00 (Tr. 18 and 19). She had an understanding with Shepherd and Hedges about leaving the car in their garage, as this was the only car of the kind in Garden City and they wanted to use it as a demonstrator, and were to keep up the expense on the car and drive it to sell other cars until they were satisfied they had received $200.00 use of the car, when they were to allow her $200.00 for the use of the car.

On the 28th day of March, 1925, she did not know anything about Clyde Brown driving the car, and knew noth[fol. 18] ing about his taking the car and going away with it, and never authorized it to be done, and had no knowledge at any time that Clyde Brown transported or carried any liquor in the car, and never saw any intoxicating liquor in the car, and never transported any in the car (Tr. 19). On the evening of March 28, 1925, she did not know where the car was never told or authorized Brown to drive the car anywhere, never knew he had driven it until this controversy arose (Tr. 20 and 21).

GEORGE M. HEDGES testified:

Acquainted with the car, in September, 1924, handling Dodge automobiles and sold this car to Mrs. Van Oster for $950.00, all of which was paid except $100.00 (Tr. 21). He made a report of the sale to the Secretary of State. Iden-

tified dealer's report made at the time of the sale as the copy which was sent to the Secretary of State after he made the sale.

Had arranged with Mrs. Van Oster to use the car as a demonstrator. Was to allow her a certain percentages of the price of the car for the use of it, which amounted approximately to $200.00. They used it as a demonstrator. The car was kept at his place of business (Tr. 22). Defendant introduced dealer's report identified by the witness, which shows a full and complete report of motor vehicles sold, bartered, or exchanged during the month of September, 1924, signed by Shepherd and Hedges, showing purchaser to be Stella Van Oster, post office address Gar-[fol. 19] den City, Kansas, Dodge Brothers touring, 1925, engine number A250395, gross weight 2700; marked Exhibit "B" (Tr. 24).

Clyde Brown testified:

Lived in Garden City about twenty-one years, defendant in this action, did not know the officers were watching or following him on the evening of March 28, 1925, was never arrested before in his life for any offense. On that evening the officers drove up and told me to stop and I stopped just as quick as I could, I was not driving fast. This was the first time I recognized who it was (Tr. 25). Richardson was standing on the running board of his car and crowded into my car. The car doors were close together and I asked what he wanted. He said he wanted to search the car, and I asked him if he had a warrant and he said he did not need any, and they proceeded to search the car and told me to get out of the car (Tr. 26). Both of them searched the car and they found no liquor in the car. There had been no liquor in the car at all, and he had no liquor in his pocket. He did not throw any liquor out of the car before reaching this point. Had been down to Cimarron to find a prospect for tractors, he was handling tractors, Hart Parr, and had an office at Cimarron. He knew Mrs. Van Oster left the car with Hedges as a demonstrator but did not say anything to her about taking the car on this day, and she knew nothing about

his driving the car on March 28 (Tr. 27). Knows noth-
[fol. 20] ing about the liquor the sheriff produced and never had it in his possession and the bottle was never in this automobile, and was never transported, and witness never transported any liquor in that car (Tr. 30).

William Lillibridge testified:

Farmer, lives seven miles from Cimarron, knows Brown and that he had a tractor business in Cimarron about March, 1925, selling Hart Parr tractors.

Was present at the trial of the case of the City of Garden City vs. Clyde Brown, tried at the City Court on or about April 11, 1925, before Police Judge and heard the testimony of Lee Richardson in that case, and Richardson testified that after they stopped the car, searched it and found nothing, he then "went back between one-half or three-fourths of a block," and that he did not say that Brown threw anything out of the car but "he said he opened the door and kicked something out just when he stopped the car." (Tr. 38 and 39.)

Cross-examination:

He is not interested in the trial in any way, shape, manner or form (Tr. 40).

B. H. Rohrbaugh testified:

Farmer, living north of Cimarron, acquainted with Clyde Brown and knows he had a business in Cimarron selling tractors in March, 1925. Attended the trial in Police Court on April 11, 1925, and heard Lee Richardson testify in [fol. 21] answer to the question as to how far he walked back after stopping the car until he found the bottle: "A. Was from a half to three fourths of a block." That he did not hear Richardson testify to Brown throwing anything out of the car with his hand, but "He said he opened the door and then kicked something out," about as he was stopping the car (Tr. 40 and 41).

"In District Court of Finney County

[Title omitted]

Motion for New Trial—Filed June 11, 1925

"Now comes said defendant, Stella Van Oster, and moves the Court to vacate the judgment ordering the confiscation and sale of the automobile in controversy in this action, on the 11th day of June, A. D. 1925, and to grant said defendant, Stella Van Oster, a new trial of this action, for the following causes which affect materially the substantial rights, to-wit:

"First. Abuse of discretion by the Court.

"Second. Erroneous rulings of the Court.

"Third. The judgment is in whole or in part contrary to the law and evidence.

Thompson & Thompson, Attorneys for Defendant Stella Van Oster.

[fol. 22] Journal entries of trial omitted; printed side page 4 ante.

[fol. 23] Notice of appeal duly made and filed June 11, 1925.

The foregoing is a true and correct abstract of the record in the above entitled case.

William H. Thompson, Wilbert F. Thompson, of Thompson & Thompson, Attorneys for Appellant.

In District Court of Finney County

Specification of Errors—Filed September 1, 1925

The trial Court erred:

1. In overruling objections to incompetent evidence offered by the State, and in taking such evidence into consideration in arriving at the decision.

2. In overruling defendant's demurrer to the evidence and motion to dismiss.

3. In finding against the defendant on the competent evidence introduced, and rendering judgment against defendant's automobile to be a common nuisance, and ordering same forfeited and sold according to law.

[fols. 24 & 25] 4. In requiring defendant on appeal to give bond "conditioned that if judgment be rendered against her on appeal that she would satisfy the same by paying the full value of said automobile," and also requiring defendant, before the approval of the bond, to pay the sum of $700.00, (full value of the car as found by the Court) into the clerk of the District Court, to be held on deposit to abide the further order of the Court.

5. In overruling defendant's motion for a new trial pro forma and without due consideration of the reasons stated.

Wilbert F. Thompson, Wm. H. Thompson, Thompson & Thompson, Tulsa, Oklahoma, Attorneys for Appellant, Stella Van Oster.

[fol. 26] IN SUPREME COURT OF KANSAS

[Title omitted]

APPELLEE'S COUNTER ABSTRACT OF RECORD FROM DISTRICT COURT OF FINNEY COUNTY—Filed October 29, 1925

OLL BROWN testified:

That on the 28th day of March, 1925, he was sheriff of Finney county, Kan.

That on said day he had been watching the defendant, Clyde Brown, and saw his car (the Dodge car in question) stop just a little way out northeast of Garden City, Kansas; that he found a jug or container of liquor where Clyde Brown had stopped with his car. (Trans. 7.)

That Lee Richardson was with him and they followed Clyde Brown and the Dodge car into town until they were about to the Henry Eichhorn property in Garden City, Kan.; that Richardson was out on the running board, and

they crowded Clyde Brown into the curb and compelled him to stop. (Trans. 1.)

That he and Richardson searched the car and Richardson walked back about fifteen steps from the car and picked up a bottle of liquor. That this bottle contained intoxicating liquor. That he took possession of Clyde Brown, the Dodge touring car and the bottle of liquor. (Trans. 2.)

That Clyde Brown later came to him and wanted to make arrangements to get the Dodge car back, as he needed it in his business. (Trans. 15.)

[fol. 27] Lee Richardson testified:

That on the 28th day of March, 1925, he was deputy sheriff and city marshal of Garden City, Kan.; that he was with Ott Brown, sheriff, on that day, and they were watching Clyde Brown, the defendant. (Trans. 8.)

That they followed Clyde Brown in the Dodge touring car from the northeast corner of Garden City, Kan., to about the Henry Eichhorn property in Garden City; that he was on the running board of Sheriff Brown's car, and they drove alongside of Clyde Brown's car and commanded him to stop; that they drove alongside of Clyde Brown for about one-half block before they could get him to stop; that he saw Clyde Brown throw a bottle of liquor out of the car before he stopped; that he went back about thirty feet and picked up the bottle and it was full of intoxicating liquor; that he drove the Dodge car away with Clyde Brown, and that Clyde Brown said he was just trying to get ahead a little bit, that his doctor bills were not paid yet. (Trans. 9, 10.) That he had seen Clyde Brown driving this car continually. (Trans. 13, 14.) That Clyde Brown talked with him about making arrangements for buying the car back, because he needed it in his business. (Trans. 14, 15.)

Stella Van Osdle testified:

That she was the owner of the Dodge touring car in question. (Trans. 17.) That Clyde Brown had driven the car so many times she couldn't state just how many. (Trans. 20.)

George M. Hedges testified:

That the Dodge touring car in question was kept in his place of business; had regular storage there, and that Clyde Brown generally brought it in and took it out; that he (Clyde Brown) took the car whenever he chose. (Trans. 22, 23.) That Clyde Brown drove this car in transacting his business. (Trans. 24.)

Clyde Brown testified:

That he used this car in his business part of the time. (Trans. 27.) That he did not ask Mrs. Van Oster every time he wanted to use it; that he needed it in his business. (Trans. 28.) That he was arrested on a liquor charge in the city court of Garden City, Kan. (Trans. 29.)

[fols. 28 & 29] Lee Kemper testified:

That he lives in Garden City, Kan.; that he is acquainted with Clyde Brown and the Dodge touring car in question; that he repeatedly saw Clyde Brown driving this car. (Trans. 31.) Supposed it was Clyde Brown's car. (Trans. 33.)

R. S. Tedwilliger testified:

That he lives in Garden City, Kan., is a motor cycle officer; saw Clyde Brown continually driving the Dodge touring car in question upon the streets of Garden City. (Trans. 35.)

John P. Hughes testified:

That he lives in Garden City, Kan.; is acquainted with Clyde Brown and the Dodge touring car in question; that he has seen Clyde Brown driving this car around town practically every day; drove it continually for awhile. (Trans. 37.)

William Lillibridge testified:

That he was not sure what Lee Richardson testified to in police court just what he understood. (Trans. 40.)

B. H. Rohrbaugh testified:

That he never talked with anyone about his testimony in this case. (Trans. 42.)

I hereby certify that the foregoing is a true and correct counter abstract of the record in the above entitled case.

C. B. Griffith, Attorney-general; C. A. Burnett, Asst. Attorney-general; Ray H. Calihan, County Attorney, Garden City, Kansas, Attorneys for Appellee.

[fols. 30 & 31] Journal entry of argument and submission November 6, 1925, omitted in printing.

[fols. 32 & 33] In Supreme Court of Kansas

No. 26584

The State of Kansas, Appellee,

v.

(Clyde Brown) and Stella Van Ostle, Appellant

Journal Entry of Judgment—December 5, 1925

This cause comes on for decision and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the appellant pay the costs of this case in this court taxed at $— and hereof let execution issue.

[fol. 34] In Supreme Court of Kansas

[Title omitted]

Opinion—Filed December 5, 1926

Syllabus by the Court

Johnston, C. J.

1. An automobile which the owner places in the possession of another for general use and such other uses it in the unlawful transportation of intoxicating liquors without the knowledge of the owner is subject to forfeiture and condemnation under the statute relating to liquor nuisances, following the State v. Peterson, 107 Kan. 641, and The State v. Stephens, 109 Kan. 254.

2. Officers of experience who found the liquor transported and determined by the sense of smell and from its appearance that it was strong intoxicating liquor are qualified to testify that it was intoxicating and no error was committed in the admission of such testimony.

Appeal from Finney District Court, C. E. Vance, Judge. Opinion Filed December 5, 1925. Affirmed

William H. Thompson, Wilbert F. Thompson, both of Tulsa, Okla., for the appellant.

C. B. Griffith, attorney general; C. A. Burnett, assistant attorney general, and Ray H. Calihan, county attorney, for the appellee.

All the justices concurring except Hopkins, J., who did not sit.

A true copy. Attest:

D. A. Valentine, Clerk Supreme Court. (Seal of Supreme Court, State of Kansas.)

[fol. 35] The opinion of the court was delivered by

Johnston, C. J.:

This appeal involves the validity of a judgment condemning and forfeiting an automobile found and declared to be a common nuisance. The grounds of forfeiture were that the automobile driven by one Clyde Brown had been used in transporting intoxicating liquors from one place to another within the state in violation of law. On one occasion when Brown was driving the car he was arrested on a charge that he was unlawfully in the possession of intoxicating liquors and on another that he was unlawfully transporting intoxicating liquors in the car in question from one place to another within the state. At the time of the arrest the automobile was seized and the possession of the same was thereafter held by the sheriff. Stella Van Oster intervened and asked to be made a party to the proceeding against the automobile and she alleged that she was the owner of the same and that if Brown had been transporting liquor in the car it was done without her knowledge or sanction. She further alleged that Brown did not have liquor in the car when it was seized by the sheriff, that none was found therein by the sheriff and that the seizure and forfeiture of the car by him and the subsequent condemnation was without authority of law and a violation of the fourteenth amendment of the federal constitution.

The first contention of Mrs. Van Oster is that there was no proof offered to show that there was liquor in the car nor that the bottle of liquor which Brown is said to have thrown from the car just before his arrest was in fact intoxicating. There is no testimony that the officers acting upon the theory that he was transporting intoxicating liquors in the car pursued and caught up with him whereupon they forced the car he was driving into the curb and stopped him. An officer testified that after Brown was ordered to stop he was seen to throw a bottle from the car about fifteen steps from where he finally did stop and that upon a search of the place, the bottle was found and that it contained strong intoxicating liquor. One of the officers [fol. 36] testified that the grounds of their suspicion was

that they had seen Brown stop at a place a short distance out of Garden City and on visiting the place they found a jug of booze at the place where Brown had stopped. Afterwards they pursued him and found no liquor in the car but did find the bottle which he was seen to throw from the car about the time they caught up with him. That bottle contained about a pint of liquid and upon examination the officers stated that it was intoxicating. While it was not tested by a chemist nor did the officers taste it, it was tested by their sense of smell and from the odor and appearance they did not hesitate to testify that it was strong intoxicating liquor. The evidence was proper and sufficient to establish its quantity and besides it appears that the bottle of liquor which Brown threw from the car just before his arrest was introduced in evidence.

In reference to the forfeiture of the car it was shown to be the Dodge car involved in this proceeding, that it was purchased from Sheppard & Hedges by Mrs. Van Oster, the previous year at a price of $950.00 and that amount was paid except the sum of $100.00. She testified that she left the car with the vendors for demonstration purposes upon an agreement that they might keep it in their garage, maintain and use it in their business, until they were satisfied that the value of such use amounted to $200.00, which sum was to be allowed by them to her. Clyde Brown was co-operating with Sheppard & Hedges in the business of selling tractors and cars and he used this car in the business frequently and so often that others thought it to be his own. While Mrs. Van Oster stated that she knew nothing of his use of the car on the day of the arrest, it appears that she saw him driving the car and knew that he used it in his business so many times that she could not state the number. Other testimony showed that Brown took and used the car at will and was driving it on the streets almost continually and some witnesses saw him drive it almost every day. Mrs. Van Oster knew and in fact could not avoid knowing that he was using the car in his business generally and almost continuously. It was not an isolated instance of Brown taking and using the car on the day of his arrest, without the knowledge of Mrs. Van Oster, but was a general use with the permission of the owner for a long period of time. We need not de-

termine whether a forfeiture may be adjudged in supposed [fols. 37 & 38] cases where cars are stolen or taken without any knowledge or permission of the owners. Here there was both knowledge and permission for general use and the case falls within the rule of cases previously decided. In a case involving the forfeiture of a car in which intoxicating liquors were transported the holder of a mortgage on a car challenged the power of the court to condemn and order a sale of it on the ground that the mortgagee had a special ownership in it and was innocent of its unlawful use. It was said:

"In our opinion it is a sufficient answer to these suggestions to say that it is within the police power of the state to provide for the forfeiture of property used in violation of a criminal statute and to provide expressly that the rights of an owner or mortgagee, however innocent of the intent or purpose for which the property is to be used, shall be forefeited, and such a law is not open to the objection that it violates the fourteenth amendment by taking property without due process of law" (The State v. Peterson, 107 Kan. 641, 193 Pac. 342).

See also The State v. Stephens, 109 Kan. 254, 198 Pac. 1087; The State v. Robinson, 118 Kan. 775; — Pac. —; Goldsmith Jr., Grant Co. v. U. S., 254 U. S. 505; H. A. White Automobile Co. v. Collins, 136 Ark. 81.

The rule applicable to a guilty automobile in which an innocent third party has a special ownership is equally appropriate to an innocent owner who holds the entire interest in the automobile. We see no reason to depart from the rule announced in the earlier decisions nor to reopen the discussion of the principles applied.

Judgment affirmed.

All the justices concurring except Hopkins, J., not sitting.

A true copy. Attest.

D. A. Valentine, Clerk Supreme Court. (Seal of Supreme Court, State of Kansas.)

[fols. 39-55] Motion for rehearing, covering 17 pages, filed December 23, 1925, omitted from this print. It was denied and nothing more by order, January 16, 1926.

[fol. 56] IN SUPREME COURT OF KANSAS

[Title omitted]

ORDER DENYING MOTION FOR REHEARING AND STAYING MANDATE—January 16, 1926

Now comes on for decision the motion for a rehearing of this cause; and thereupon it is ordered that said motion for a rehearing be overruled. It is further ordered that the issuance of the mandate herein be stayed 20 days from this date for the purpose of appealing to the Supreme Court of the United States.

[fols. 57 & 58] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 59] IN SUPREME COURT OF KANSAS

[Title omitted]

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed January 21, 1926

To the Honorable William A. Johnston, Chief Justice Supreme Court of Kansas:

The above named appellant, Stella Van Oster, feeling aggrieved by the order denying a rehearing entered in the above entitled cause on the 16th day of January, 1926, and by the decision of this Court affirming the judgment of the District Court in and for the County of Finney and State of Kansas, does hereby appeal from said order and decision to the Supreme Court of the United States, and respectfully prays that her appeal may be allowed and that citation be issued as provided by law, and that a transcript of

the record, proceedings and document upon which said order and decision were based, duly authenticated, be sent to the Supreme Court of the United States, sitting at Washington D. C., under the rules of the Supreme Court in such cases made and provided. Assignment of Errors attached hereto.

And your petitioner further prays that the proper order relating to security to be required of her be made, and in connection therewith special attention is called to the fact that the record in this Court shows a cash deposit made in the District Court to fully cover the value of the automobile in question.

Dated at Topeka, Kansas, this 21st day of January, 1926.

Wm. H. Thompson, Wilbert F. Thompson, Attorneys for Appellant.

Appeal allowed upon giving bond as required by law for the sum of $500.00.

W. A. Johnston, Chief Justice.

[fol. 59a] [File endorsement omitted.]

[fol. 60] IN SUPREME COURT OF KANSAS

[Title omitted]

ASSIGNMENTS OF ERROR—Filed January 21, 1926

Now comes the appellant above named and files the following assignment of errors upon which she relies for the prosecution of her appeal to the Supreme Court of the United States from the final judgment and decision of this Honorable Court in the above entitled cause made on the 16th day of January, 1926, where is drawn in question the validity of a statute of the State of Kansas on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity; the same being adverse to the contention of appellant that she is thereby deprived of property without compensation and without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, as

will more particularly appear from the following assignment of errors, towit:

1. The Supreme Court of Kansas erred in affirming the judgment of the trial court in an action in the District Court of Finney County, Kansas, in which appellant was defendant and appellee was plaintiff, by its decision rendered herein December 5, 1925, in holding that:

(a) "An automobile which the owner places in the possession of another for general use and such other uses it in the unlawful transportation of intoxicating liquor without the knowledge of the owner is subject to forfeiture and condemnation under the statute relating to liquor nuisances, following The State v. Peterson, 107 Kan. 641, and The State v. Stephens, 109 Kan. 254."

and also in holding that:

(b) "Officers of experience who found the liquor transported and determined by the sense of smell and from its appearance that it was strongly intoxicating liquor are qualified to testify that it was intoxicating and no error was committed in the admission of such testimony."

[fol. 61] and also in holding that:

(c) "The rule applicable to a guilty automobile in which an innocent third party has a special ownership is equally appropriate to an innocent owner who holds the entire interest in the automobile."

2. The Supreme Court of Kansas erred in holding that the laws of the State of Kansas 1919 Chapter 217, being Sections 21-2162 to 21-2166 inclusive, Revised Statutes of Kansas 1923, are constitutional and valid, although depriving the owner of an automobile, when the same is used without the knowledge or authority of the owner in the transportation of intoxicating liquor, without compensation and without due process of law.

3. The Supreme Court of Kansas erred in holding that the Legislature of the State of Kansas, by the passage of said laws declaring automobiles unlawfully transporting intoxicating liquor to be a nuisance subject to forfeiture,

including the forfeiture of the rights of an innocent owner, and innocent mortgagees and lienholders, is a reasonable exercise of state's reserve police power, and is not the taking of private property without just compensation and without due process of law, and is not in violation of the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of Kansas erred in holding that the Kansas law does not deprive appellant of the right guaranteed her by the National Prohibition Act for the return of her property, she having had no notice or knowledge of its unlawful use in the transportation of intoxicating liquor.

5. The Supreme Court of Kansas erred in overruling the motion of appellant for a rehearing in said cause, and in failing to order a dismissal of the action, it appearing from the record that Clyde Brown, the person charged with unlawfully transporting liquor in appellant's automobile, was acquitted of the charge by a jury trial explicitly and finally determining that no crime was committed in the use of said automobile.

Wherefore appellant prays that said order and decision of the Supreme Court of the State of Kansas be reversed and that said Court be ordered to render a decision and judgment reversing the judgment of the District Court of Kinney County, Kansas, and ordering a dismissal of said cause.

Wm. H. Thompson, Wilbert F. Thompson, Attorneys for Appellant.

[fol. 61a] [File endorsement omitted.]

[fol. 62] IN SUPREME COURT OF KANSAS

[Title omitted]

WRIT OF ERROR—Filed January 21, 1926

The President of the United States to the Honorable Justice of the Supreme Court of the State of Kansas, Greeting:

Whereas in the record and proceeding and in the rendition of the judgment in the above entitled cause, which is now before you, or some of you, between the State of Kansas, appellee, and Stella Van Oster, appellant, your court being the highest court of said state having jurisdiction of the cause, there was drawn in question the validity of a statute of the State of Kansas on the grounds of it being repugnant to the Constitution of the United States, and the decision is in favor of its validity, the same being adverse to the contention of appellant that she is to be deprived of property without compensation and without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, as appears from the Assignment of Errors filed in her behalf;

And whereas there is manifest error in said decision to the damage of the petitioner in error, the said Stella Van Oster, the appellant above named, and whereas we are willing that if it is error it should be corrected, we command you, therefor-, if judgment be given therein, that you send under seal of your Court the records and proceedings in said cause to the Supreme Court of the United States, together with this writ, within such time as may be necessary in order that you have the same at Washington on the 20th day of February, 1926; that the record may be then inspected by the Supreme Court of the United States, to be then and there held in order that justice may be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the 21st day of January, A. D. 1926.

H. Campbell, Clerk of U. S. District Court, 1st Division of Dist. of Kansas. (Seal of District Court, District of Kansas.

Writ of Error allowed this 21st day of January, 1926.

W. A. Johnston, Chief Justice of Sup. Ct. of Kansas.

[fol. 62a] [File endorsement omitted.]

[fols. 63 & 64] Bond on writ of error for $500.00, approved and filed February 3, 1926, omitted in printing.

[fols. 65 & 66] Citation in usual form, showing service on C. B. Griffiths and Ray H. Calihan, filed February 3, 1926, omitted in printing.

[fol. 67] Certificate of lodgment omitted in printing.

[fol. 68] Return to writ of error omitted in printing.

[fol. 69] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION BY PLAINTIFF IN ERROR TO PRINT THE ENTIRE RECORD—Filed March 6, 1926

Comes now the plaintiff in error, by William H. Thompson, of the firm of Thompson & Thompson, her attorney, and respectfully represents that plaintiff in error intends to rely upon each and all of the points particularly designated in the assignment of errors filed herein as follows, towit:

1. Supreme Court of Kansas erred in holding that the Legislature of the State of Kansas, by the passage of the laws declaring automobiles unlawfully transporting intoxicating liquor to be a nuisance subject to forfeiture, including the forfeiture of the rights of an innocent owner, and innocent mortgagees and lienholders, is a reasonable exercise of state's reserve police power, and is not the taking of private property without just compensation and without due process of law, and is not in violation of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Kansas erred in holding that the laws of the State of Kansas 1919 Chapter 217, being Sections 21-2162 to 21-2166 inclusive, Revised Statutes of Kansas 1923, are constitutional and valid, although depriving the owner of an automobile, when the same is used without the knowledge or authority of the owner in the

transportation of intoxicating liquor, without compensation and without due process of law.

3. The Supreme Court of Kansas erred in holding that the Kansas law does not deprive appellant of the right guaranteed her by the National Prohibition Act for the return of her property, she having had no notice or knowledge of its unlawful use in the transportation of intoxi- [fols. 70 & 71] cating liquor.

4. The Supreme Court of Kansas erred in affirming the judgment of the trial court in an action in the District Court of Finney County, Kansas, in which appellant was defendant and appellee was plaintiff, by its decision rendered therein December 5, 1925, in holding that:

(a) "An automobile which the owner places in the possession of another for general use and such other uses it in the unlawful transportation of intoxicating liquors without the knowledge of the owner is subject to forfeiture and condemnation under the statute relating to liquor nuisances, following The State v. Peterson, 107 Kan. 641, and The State v. Stephens, 109 Kan. 254."

and also in holding that:

(b) "Officers of experience who found the liquor transported and determined by the sense of smell and from its appearance that it was strong intoxicating liquor are qualified to testify that it was intoxicating and no error was committed in the admission of such testimony."

and also in holding that:

(c) "The rule applicable to a guilty automobile in which an innocent third party has a special ownership is equally appropriate to an innocent owner who holds the entire interest in the automobile."

5. The Supreme Court of Kansas erred in overruling the motion of appellant for a rehearing in said cause, and in failing to order a dismissal of the action, it appearing from the record that Clyde Brown, the person charged with unlawfully transporting liquor in appellant's automobile in the same action was acquitted of the charge by a jury trial, explicity and finally determining that no crime was committed in the use of said automobile.

To properly present the above points we respectfully ask the printing of the entire record except the unnecessary captions, endorsements on all papers, motion for stay of execution and to withhold mandate pending preparation of petition for order allowing appeal, stipulation designating portion of record to be included in transcript and the appeal bond for five hundred dollars, except the notation that the same was duly given and approved.

Wm. H. Thompson and Wilbert F. Thompson, Attorneys for Plaintiff in Error.

[fol. 72] [File endorsement omitted.]

[fol. 73] In Supreme Court of the United States

Proof of Service of Statement of Points, etc.—Filed March 13, 1926

We, the undersigned, attorneys for defendant in error, hereby acknowledge service of the statement of the points on which the plaintiff in error intends to rely and the designation of the parts of the record to be printed, this 6th day of March, 1926.

C. B. Griffith, Attorney General of the State of Kansas. Ray H. Calihan, County Attorney of Finney County, Kansas.

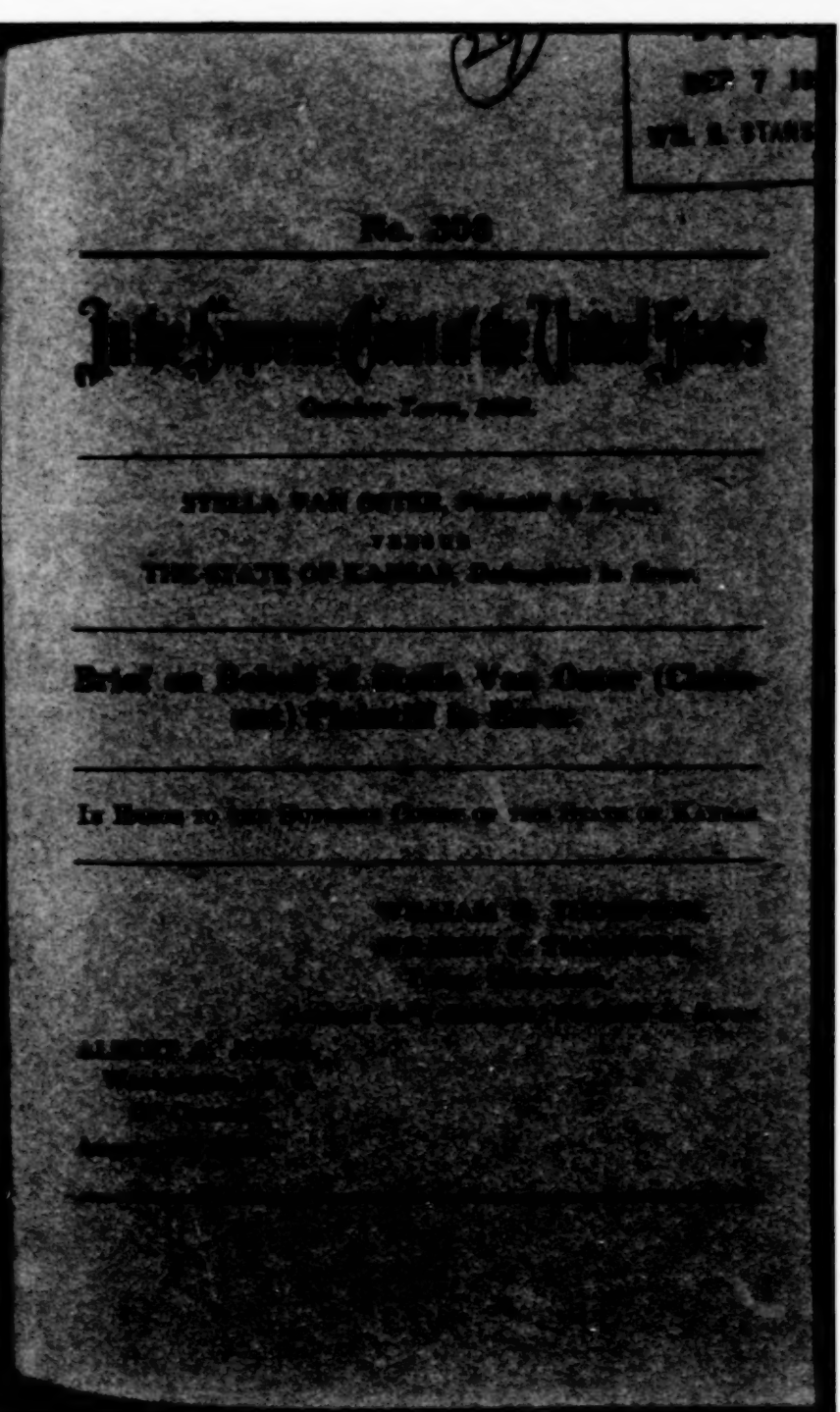
[fol. 74] [File endorsement omitted.]

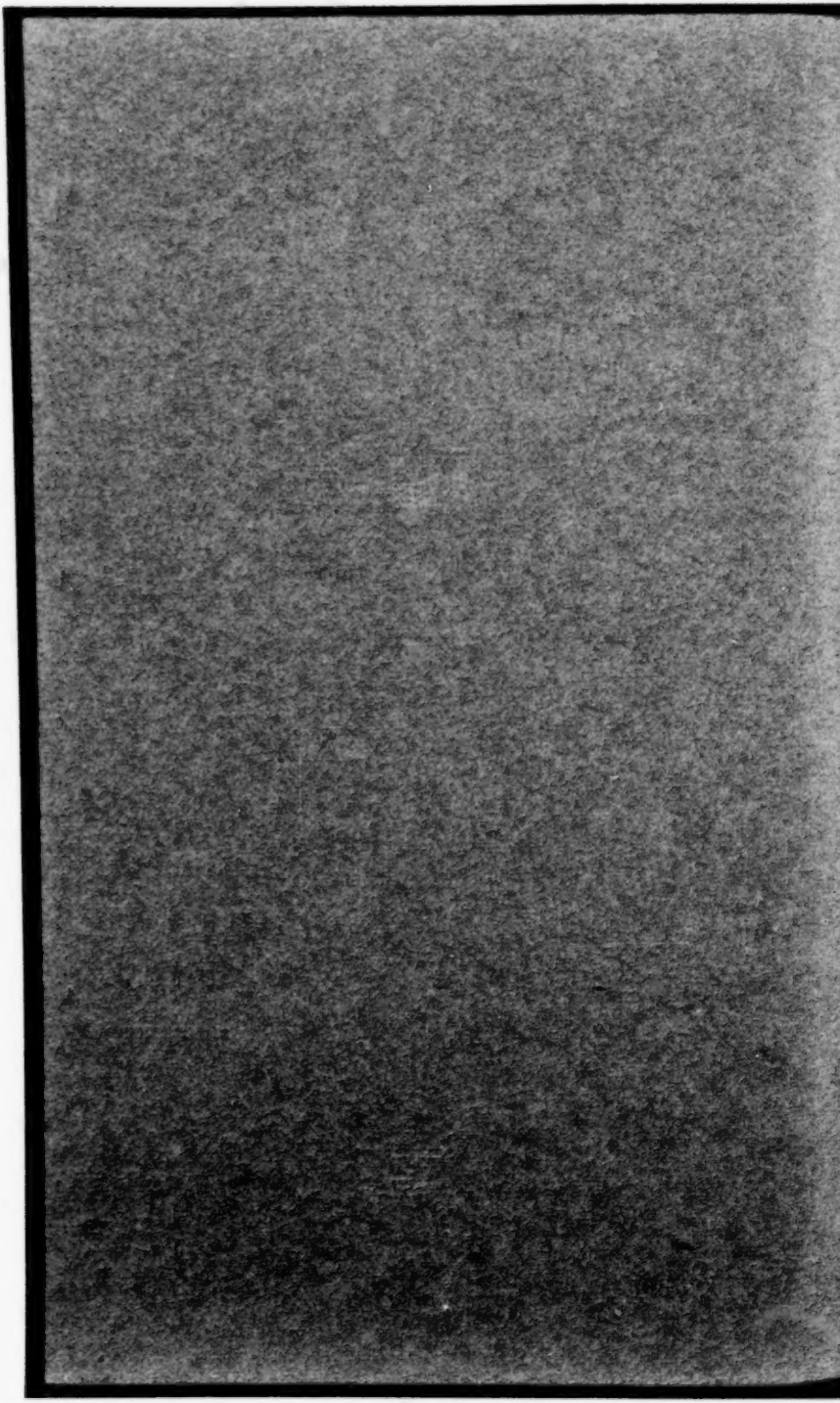
Endorsed on cover: File No. 31,716. Kansas Supreme Court. Term No. 303. Stella Van Oster, plaintiff in error, vs. The State of Kansas. Filed February 23d, 1926. File No. 31,716.

"However, since the trial of the case against the automobile, and since the decision of the same in the Supreme Court, Brown was recently tried at the December Term of the District Court at Garden City in the State case, and was found not guilty of the offense of transporting liquor in the car as charged, said verdict of the jury being returned on December 17, 1925, and is as follows, towit:

'We, the Jury impaneled and sworn in the above entitled case, do upon our oaths find the defendant guilty of having intoxicating liquor in his possession as charged in the First County of the Information. And further find the defendant not guilty of the offense of transporting intoxicating liquor as charged in the Second Count of the Information. Geo. E. Dillon, Foreman.'

"By this trial Brown was found guilty of having in his possession, or rather under his control, the jug of liquor where he had stopped with his car out in the country (Appellee's Counter Abstract, page 1, paragraph 2), and which jug it is admitted and conceded all the way through was never transported in the car in question. We therefore find the defendant absolutely acquitted from any unlawful use of the car in question, and it is therefore clear that the car has been wrongfully and illegally confiscated in this proceedings; for of course, unless it was put to an unlawful use, simply because Brown may have had control or access to a jug of liquor out in the country, could not possibly justify the confiscation of the car when there is no evidence anywhere that any liquor was found in the car or transported therein. This Court will certainly not permit the confiscation of an automobile where it has been found by a jury in the same case, under exactly the same state of facts, that it was not being used in the unlawful transportation of the intoxicating liquor in question."





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AUTHORITIES CITED.

AUTHORITIES—CONTINUED.

U.S. vs One Chevrolet Coupe 9 Fed.2d 85-26

U.S. vs Reo Speed Wagon 5 Fed.2d 372 -26

IN THE SUPREME COURT OF THE UNITED STATES.

Occtober Term, 1926.

No. 303.

STELLA VAN OSTER, *Plaintiff in Error,*

vs.

THE STATE OF KANSAS, *Defendant in Error.*

BRIEF ON BEHALF OF STELLA VAN OSTER (CLAIMANT), PLAINTIFF IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Statement Showing Jurisdiction.

This is an appeal on writ of error from a final judgment and decision of the Supreme Court of the State of Kansas in the case of *The State of Kansas, appellee*, v. *(Clyde Brown) and Stella Van Oster, appellant*, reported in 119 Kan., at pages 874 to 876, printed in full in the record, pages 18 to 21, inclusive, wherein said court sustained a judgment rendered June 11, 1925, by the District Court of Finney County, Kansas, condemning and forfeiting an automobile declared to be a common nuisance under the prohibitary liquor laws of the State of Kansas (R. 1 and 2). A motion for rehearing was denied by the Supreme Court of Kansas January 16, 1926 (R. 22).

It is our contention that the lower court failed to comprehend and refused to recognize the rights of appellant under the Constitution of the United States to prevent the forfeiture of the automobile in question, on the ground that the laws of the State of Kansas, 1919, Chapter 217 (Rev. St. Kan., 1923, Sections 21-2162 to 21-2166, set out in full in Appendix), declaring automobiles unlawfully transporting intoxicating liquor to be a nuisance subject to forfeiture, including the forfeiture of the rights of an innocent owner, and innocent mortgagees or lienholders, is not reasonable exercise of state's reserve police power, but is the taking of private property without just compensation, in violation of the Fourteenth Amendment to the Constitution of the United States; and that the said statutes, as interpreted by the Supreme Court of Kansas in its decision, deprives appellant of her property without just compensation and without due process of law, and is in violation of the Fourteenth Amendment to the Constitution of the United States; and that the seizure of the automobile in question without a warrant under the facts in this case was an unauthorized and unreasonable seizure and in violation of the Fourth Amendment to the Constitution of the United States and in direct violation of the statutes of the State of Kansas under which the proceeding in this case was had.

Statement of the Case.

This action was brought under the Statutes of Kansas, hereinbefore referred to (see appendix) to forfeit a Dodge touring automobile driven by one Clyde Brown, alleged to have been transporting intoxicating liquor (R. 3 and 4). Brown was arrested and the car seized without a warrant by the sheriff of Finney County, Kansas, on the

evening of March 28, 1925 (R. 7). The car is owned by Stella Van Oster, who appeared and answered in the case as the owner (R. 4 and 5). There is no question about the ownership of the car, Mrs. Van Oster having bought and paid for it from Shepherd & Hedges, automobile dealers at Garden City, Kansas, for $950.00, which she had paid in full except $100.00 on which she was to get a credit from Shepherd & Hedges for the use of the car as a demonstrator, it being the only car of the kind in Garden City at that time (R. 10 and 11). Mrs. Van Oster did not know anything about Clyde Brown driving the car on this occasion and never consented to, or authorized, him to drive it on this evening, and had no knowledge at any time that Brown transported or carried liquor in the car, and never saw intoxicating liquor in the car and never transported any in the car. On the evening of March 28, 1925, she did not know where the car was and never told or authorized Brown to drive the car anywhere, and never knew he had driven it until this controversy arose (R. 10 and 11).

Brown had never been suspicioned or arrested by the officers before for any offense, and regardless of this fact they met him out in the road near Garden City and followed him for about a mile and a half, and then without a warrant having been sworn out as required by the statute, and after a thorough search of the car and finding no liquor in the car or on Brown's person, they arrested Brown and took immediate possession of the car. (Sheriff Ol Brown's testimony, R. 7; Clyde Brown's testimony, R. 11.)

Clyde Brown had a tractor business at Cimarron (about 30 miles east of Garden City), and on the day in question had taken the car from the garage without the knowledge

of Stella Van Oster, the owner, where it had been left by her for storage and use as a demonstrator, and Brown drove over to Cimarron to look after his personal business at his office in Cimarron. (Clyde Brown's testimony, R. 11.)

Clyde Brown never knew that the sheriff or any one was following until the car the sheriff and marshal Richardson were in ran up along side of his car near the Eichron place on Fourth street in Garden City, when Richardson, from the running board of the sheriff's car, called for him to stop, and Clyde Brown was crowded over to the curb and stopped as quickly as he could (R. 11). Brown had no opportunity whatever to throw anything out of the car during this short interval if he had desired to do so, under the testimony of all parties who were present on the occasion. The sheriff did not see Brown throw anything out of the car and did not see Richardson pick up anything away from the car. The sheriff simply saw Richardson walk back some distance from where the car stopped and later returned with a broken bottle of about a pint of liquor (Ol Brown, R. 6). Not finding anything in the car or on the person of Brown, Richardson, evidently being disappointed, walked back some distance from where the car stopped and later returned with a broken pint bottle, partly filled with liquor, which he claimed on this hearing to have picked up in the weeds and to have seen Brown throw out of the car, and that he picked it up about 35 feet from where the car stopped (R. 7); but on the trial of Clyde Brown in the city court on the same charge he testified that he "went back between one-half or three-fourths of a block" and that he did not see Brown throw anything out of the car. (Lillibridge and Rohrbaugh, R. 12.)

On December 17, 1925, Clyde Brown, the original defendant in this case, who was arrested and charged with unlawfully transporting intoxicating liquor in claimant's automobile at the particular time in question, and under exactly the same state of facts, was tried by a jury and found not guilty of transporting intoxicating liquor in claimant's car. So as the case now stands, we have the courts of Kansas actually forfeiting an automobile which was not being used unlawfully by anybody, and in which intoxicating liquor was not being transported at the time it was seized. (Extract from petition for rehearing, R. 30). We claim there could not be a clearer case of absolute confiscation of property without the slightest legal right.

SUMMARY *of* ARGUMENT.

1. The Kansas Act forfeiting rights of innocent owner by declaring automobiles unlawfully transporting intoxicating liquor to be a nuisance and subject to forfeiture is not reasonable exercise of state's reserve police power, and is taking property without compensation in violation of the Fourteenth Amendment.

—*National Bond & Investment Company* v. *Gibson, Sheriff*, 6 Fed. Rep., 2nd Series, 288.

The state cannot justify the act as within the police power of the state in violation of the Constitution.

—*Bonnet* v. *Vallier*, 136 Wis. 193, 116 N. W. 885;
United States v. *Cohen*, 268 Fed. 423;
Lawton v. *Steele*, 152 U. S. 133, 137;

Exp. Witwell, 98 Cal. 73, 32 Pac. 870, 35 Am. St. Rep. 152, 19 L. R. A. 727;
Lake Shore Ry. Co. v. *Smith*, 173 U. S. 684;
Buchanan v. *Warley*, 38 Sup. Ct. Rep. 16;
Ex parte White, 198 S. W. 583;
Freund on Police Power, 511, 514 and Sec. 525;
City of Chicago v. *Stockyards Co.*, 164 Ill. 224;
Brightman v. *Bristol*, 65 Me. 426;
Barclay v. *Com.*, 25 Pen. 503.

2. The Kansas Act by taking property without due process of law violates the Fourteenth Amendment to the Constitution.

—12 C. J. 931;
Durgin v. *Minot*, 203 Mass. 144, 89 N. E. 144;
12 C. J. 922;
Lawton v. *Steele*, 152 U. S. 140, 14 Sup. Ct. 502, 38 L. ed. 385.

Kansas Act is also unconstitutional because it denies right of trial by jury.

—Sec. 5, Kansas Constitution, 7th Amend. to the Constitution;
Sec. 3, Ch. 217, Laws 1919 (21-2164 Rev. St. Kan. 1923);
State v. *Lee*, 113 Kan. 462;
24 Cyc 108;
Colon v. *Lisk*, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609;
United States v. *Athens Armory*, 24 Fed. Cas. No. 14473, 2 Abb. 129, 35 Ga. 344;
United States v. *The Queen*, 27 Fed. Cas. No. 16107, 4 Ben. 237 (affirmed in 27 Fed. Cas. No. 16108, 11 Blatchf. 416);

Capital Traction Co. v. *Hof*, 174 U. S. 1;
Parsons v. *Bedford*, 3 Pet. 433; ;
Springville v. *Thomas*, 166 U. S. 708;
Baylis v. *Travelers Ins. Co.*, 113 U. S. 320.

3. The Kansas law deprives claimant of a right guaranteed her by the National Prohibition Act.

—41 Stat. 315;
Gibbons v. *Ogden*, 9 Wheat. (U. S.) 209;
Poindexter v. *Greenbow*, 114 U. S. 270;
Art. 6, Sec. 2, U. S. Constitution;
Sec. 8, Art. 1, U. S. Constitution;
James Everard's Breweries v. *Day*, 265 U. S. 545, 558, 559, 44 Sup Ct. 628, 631, 40 Sup. Ct. 486;
Mugler v. *Kansas*, 123 U. S. 623;
Hamilton v. *Ky. Dist. Co.*, 251 U. S. 146, 40 Sup. Ct. 106;
United States v. *Sylvester*, 273 Fed. 253;
United States v. *Brickley*, 266 Fed. 1001;
The Saxon, 269 Fed. 639;
United States v. *One Paige Automobile*, 266 Fed. 524.

4. The Supreme Court of Kansas erred in affirming the judgment of the District Court of Finney County, Kansas, and in its decision stated in each paragraph of the syllabus of the opinion in the case of *State of Kansas* v. *Stella Van Oster*, 119 Kan. 874.

—*Boles, et al.*, v. *State*, 77 Okl. 310;
Hoskins v. *State*, 82 Okl. 201;
Naylor v. *Simmons*, 33 Idaho 323, 194 Pac. 94;
United States v. *One Buick Roadster*, 280 Fed. 517;

United States v. *Two Bbls. Whiskey*, 96 Fed. 479 (C. C. A.);
United States v. *Sylvester*, 273 Fed. 253;
Jackson v. *United States*, 295 Fed. 620;
Oakland Motor Co. v. *United States*, 295 Fed. 626;
Goldsmith Jr.-Grant Company v. *United States*, 254 U. S. 505.

There is no competent proof that the liquor in question was intoxicating liquor. (R. 7 and 8.)

5. The automobile in question was not used in the unlawful transporting of intoxicating liquor and so found by a jury.

—(Extract from Petition for Rehearing, R. 30.)

The seizure in this case was unreasonable and violates the Fourth Amendment to the Constitution.

—*Carroll, et al.*, v. *United States*, 260 U. S. 132.

ARGUMENT.

Discussing the questions presented in the order designated in the assignment of errors (R. 27 and 28):

I.

The Supreme Court of the State of Kansas erred in holding that the Legislature of the State of Kansas, by the passage of the laws declaring automobiles unlawfully transporting intoxicating liquor to be a nuisance subject to forfeiture, including the forfeiture of the rights of an innocent owner, and innocent mortgagees and lienholders, is a reasonable exercise of state's reserve police power, and is not the taking of private property without just compensation and without due process of law, and is not in violation of the Fourteenth Amendment to the Constitution of the United States.

While there is not much money at stake in this particular case, yet every owner of an automobile in the country is vitally interested in the principle involved.

So far as we know this is the first time this identical question has been presented to this court, but we are not without some direct authority on the particular points raised. Judge POLLOCK of the District Court of Kansas passed on this identical question in a very able opinion rendered in the case of *National Bond & Investment Company* v. *Gibson, Sheriff*, reported in 6 Federal Reporter, 2nd Series, pages 288 to 293, inclusive, and expressly held that the statute forfeiting automobiles used in unlawfully transporting intoxicating liquor, including rights of innocent chattel mortgagee, is invalid, as taking property

without just compensation in violation of the Fourteenth Amendment. If this is true as to the rights of a mortgagee, there is certainly more reason for so holding in protecting the rights of an absolute owner, who holds the complete title to the property. Judge POLLOCK discusses the Kansas statutes, cites and distinguishes numerous cases sustaining his views, and we respectfully invite consideration of the entire opinion as it throws light on the principal questions involved in this case. In summing up the opinion, on page 293, it is stated:

> "But when property, such as an automobile, in and of itself innocent and lawful, and in no sense whatever specially adapted to the commission of crime, more than any other species of conveyance, and when such property is employed only for a wrongful purpose in carrying out the criminal intent of the wrongdoer, is incumbered by a valid chattel mortgage in the hands of an entirely innocent holder as security for an indebtedness due, is by the law of the state stricken down without power or right to impose the defense of an innocent holder for value, and such property is forfeited by the state, and in a sale of the car the proceeds are confiscated by being turned over into the school fund of the state, such a proceeding is so utterly repugnant to the natural justice of the case, and to our ideas of the protection by the law afforded to the innocent owner of lawful property rights, that in my judgment the exercise of such power by the state does not fall within the reasonable exercise of the reserve police power of the state, but on the contrary, is the taking of private property without just compensation to the owner, in violation of our rights as guaranteed by the Fourteenth Amendment to the National Constitution."

The Police Power.

A consideration of this question naturally requires a discussion of the police power of a state. The justification for such iniquitous legislation is that it is within the police power of the state in the protection and securing of the health, peace, morals and good order of its citizens.

The police power of the states is not without its limitations. The state cannot justify an act which is plainly a violation of a right guaranteed to a citizen of the United States by the Federal Constitution or an Act of Congress made in pursuance thereof, under the guise of its police power.

> "A police regulation must not extend beyond that reasonable interference which tends to preserve and promote enjoyment, generally, of those 'inalienable rights' with which 'all men are endowed' and to secure which 'governments are instituted among men' and must not violate any express prohibition or requirement of the state or national constitution."
>
> —*Bonnet* v. *Vallier*, 136 Wis. 193, 116 N. W. 885.

> "Generally in the valid exercise of the police power are included all things essential to the conservation of the public safety, public health and public morals."
>
> —*United States* v. *Cohen*, 268 Fed. 423.

There is no reasonable necessity for such a statute as the one under consideration. There is no necessity for the confiscation of the property of an innocent party in order that prohibition may be enforced. How can it be said that deprivation of an innocent owner's rights can aid the state in preventing the sale of liquor?

"To justify the state in thus interposing its authority in behalf of the public, it must appear, *first*, that the interests of the public generally, as distinguished from a particular class, require such interference; and, *second*, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."

—*Lawton* v. *Steele*, 152 U. S. 133, 137.

"To be valid as police regulation, laws must be necessary to the preservation of the health, comfort, morals, order or safety of the community; and no law prohibiting that which is harmless in itself, or commanding that be done which does not tend to promote the health, safety or welfare of society, will be sustained."

—*Exp. Witwell*, 98 Cal. 73, 32 Pac. 870, 35 Am. St. Rep. 152, 19 L. R. A. 727.

The exercise of police power must be of such character as is fairly or reasonably necessary to promote the safety, health, convenience or protection of the public.

—*Lake Shore Ry. Co.* v. *Smith*, 173 U. S. 684;
Buchanan v. *Warley*, 38 Sup. Ct. Rep. 16;
Ex parte White, 198 S. W. 583.

"Under the police power, rights of property are impaired, not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interest; it may be said that the state takes property by

eminent domain, because it is useful to the public, and under the police power because it is harmful or, as Justice BRADLEY puts it, 'because the property itself is the cause of the public detriment.' * * * The absence of compensation, however, makes the police power much more incisive in operation, than the power of eminent domain, and hence, subject to stricter limitations."

—Freund on Police Power, 511, 514.

The police power of the state, therefore, must be exercised with great caution. It is unlike the power of eminent domain, which carries with it compensation for the taking or destruction of property, and it is not contemplated that the exercise of police power shall destroy property which is harmless in itself for the very reason that compensation is not an adjunct to its exercise.

"The absolute destruction or abrogation of property rights—including confiscatory regulation—leaving no reasonable profit to the owner is an extreme exercise of the police power. Where it is proposed to exercise such authority, the constitutional right of private parties must be weighed against the demands of the public welfare, and it is obvious that a public interest which is strong enough to justify regulation may not be strong enough to justify destruction or confiscation without compensation. Submission to regulation may be said to be one of the conditions upon which all property is held in the community; but total sacrifice negatives altogether the right of property. The conditions justifying the demand of such sacrifice must therefore be carefully examined."

—Freund on Police Power.

"The power of summary abatement does not extend to property in itself harmless, which may be law-

fully used, but which is actually due to unlawful use, or is otherwise kept in a condition contrary to law. So, if a certain kind of transportation is a nuisance, this does not justify the tearing up of railroad tracks. A house of ill fame may not be torn down summarily; a building where liquor is kept unlawfully for sale may not be destroyed, and a canal may not be destroyed because not kept in a clean condition."

—Freund on Police Power, section 525.

In *City of Chicago* v. *Stockyards Company*, 164 Ill. 224, it was held that a stockyards company, authorized to operate a railroad through a city and transport freight of every kind creates a nuisance by the transportation of live-stock or other substance injurious to the health and general welfare, does not justify the city in removing its track from the street, as an abatement of the nuisance, to the destruction of the value of the road.

See, also, *Brightman* v. *Bristol*, 65 Me. 426, and *Barclay* v. *Com.*, 25 Pen. 503, where in the latter case it was said:

"The offense lay in the use made of the barn and yard in close proximity to the spring, and the nuisance would be effectually abated by discontinuing such use. When an erection or structure itself constitutes the nuisance, as when it is put up in a public street, its demolition or removal is necessary to the abatement of the nuisance; but when the offense consists in a wrongful use of a building harmless itself, the remedy is to stop such use, not to tear down or remove the building itself."

It is obvious that the state cannot in the exercise of its police power confiscate plaintiff's automobile in question and the statute, as construed by the Kansas Su-

preme Court, so far as it attempts to do so, is arbitrary and unreasonable and is, therefore, unconstitutional and void.

II.

The Supreme Court of Kansas erred in holding that the laws of the State of Kansas, 1919, chapter 217, being sections 21-2162 to 21-2166, inclusive, Revised Statutes of Kansas, 1923, are constitutional and valid, although depriving the owner of an automobile, when the same is used without the knowledge or authority of the owner in the transportation of intoxicating liquor, without compensation and without due process of law.

Much of what we have said under our first assignment of error is also applicable to this assignment. The Kansas Act as interpreted by the Supreme Court of the State of Kansas plainly and concededly deprives an innocent owner of an automobile used in the unlawful transportation of liquor, any protection. It constitutes the taking of property "without due process of law," and is therefore violative of the 14th Amendment to the Constitution of the United States.

Property rights are sacred and will not lightly be set aside. A statute is not rendered unconstitutional by the mere fact that property rights are subject to restraint or that loss will result from its enforcement, yet, any "order, statute or ordinance will be void if it operates as a confiscation of private property, or constitutes an arbitrary or unreasonable infringment on personal or property rights."

—12 C. J. 931.

> "But if the enjoyment of private property must be held subordinate to such reasonable regulations as are essential to the peace, safety, good order and morals

of the community, yet, under the guise of enactments for its protection, lawful property cannot be confiscated."

—*Durgin* v. *Minot*, 203 Mass. 144, 89 N. E. 144.

An automobile is lawful property, generally used for lawful purposes. It is not to be classed as poker chips, dice, and other gambling devices which are termed *mala in se*, nor is it to be catalogued as that which is dangerous to the public health as unwholesome food, cesspools, etc., which constitute nuisances. Nor can the mere statement of the Legislature make that a nuisance which is not in fact a nuisance.

"On the ground of preventing or abating nuisances the state or a municipality may, in the exercise of the police power, prohibit or regulate the transaction of business in such places or manner as constitute a nuisance, although it may not by mere fiat make that a nuisance which is not in its real nature a nuisance."

—12 C. J. 922.

"The word 'nuisance' has a well defined meaning in the law and a thing cannot be declared a nuisance by statute, and abated as such, when in fact it is obviously not a nuisance. The rule laid down by the Supreme Court of the United States upon this point is that—'while the Legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed'."

—*Lawton* v. *Steele*, 152 U. S. 140, 14 Sup. Ct. 502, 38 L. ed. 385;

National Bond & Inv. Co. v. *Gibson*, 6 Fed., 2nd Series, 288.

Kansas Act is also unconstitutional and void because it denies right of trial by jury.

Section 3, Chapter 217, Laws 1919 (21-2164 Rev. St. of Kan., 1923), provides that after issues are joined by the filing of an answer to the complaint, "A trial shall be had in a summary manner before the court of the allegations of the complaint or information, against the property seized." The Supreme Court of Kansas in the case of *State* v. *Lee*, 113 Kan. 462, also squarely holds that a defendant is not entitled to a jury in this kind of a case under this statute. This statute therefore, and as construed by the Kansas Supreme Court, expressly denies the right of trial by jury on the issues of fact, which in this case were simply whether or not the answering defendant was the owner of the automobile, and whether she had given Brown permission to drive it on the occasion in question, and whether or not she had any notice or knowledge that the same was being used on this occasion for the transportation of intoxicating liquor. This is in violation of section 5 of the Bill of Rights of Kansas Constitution, which provides:

> "Section 5, *Trial by Jury.* The right of trial by jury shall be inviolate,"

and results also in the violation of the Seventh Amendment to the Constitution of the United States, which provides:

> "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

—*Capital Traction Co.* v. *Hof*, 174 U. S. 1;
Parsons v. *Bedford*, 3 Pet. 433;
Springville v. *Thomas*, 166 U. S. 708;
Baylis v. *Travelers Ins. Co.*, 113 U. S. 320.

The taking of private property in a summary manner is certainly a most dangerous procedure under our American form of government. The proceedings in this case demonstrate the injustice brought about by it, for the court trying the case alone, in order to confiscate the car, finds that Brown was transporting intoxicating liquor in the automobile at the time; while a jury on the trial of Brown finds that he was not guilty of such an offense. (See verdict, R. 30, extract from petition for rehearing.) It is clear that if Brown was not guilty of transporting liquor in the car that the car could not, under the law, be confiscated, and we are satisfied that if Brown had been tried first, that the car would have been immediately released by the court. In any event it is not reasonable to suppose that a trial judge would on the same state of facts, where the questions of fact are very close, put his individual judgment against the opinion of twelve men, especially where it would result in the confiscation of the property of an innocent owner. He might do it to prevent a miscarriage of justice, but he would not do it where it would result in a clear miscarriage as in this case. Both decisions cannot be correct.

> "Actions to enforce penalties and forfeitures are ordinarily triable by jury."
>
> —24 Cyc 108.

> "It has been held that a statute providing for the seizure and sale of a boat or vessel used by one person in interfering with the oysters or shell-fish of another without a jury trial is unconstitutional."
>
> —*Colon* v. *Lisk*, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609;
>
> *United States* v. *Athens Armory*, 24 Fed. Cas. No. 14473, 2 Abb. 129, 35 Ga. 344;

United States v. *The Queen*, 27 Fed. Cas. No. 16107, 4 Ben. 237 (affirmed in 27 Fed. Cas. No. 16108, 11 Blatchf. 416).

III.

The Supreme Court of Kansas erred in holding that the Kansas law does not deprive appellant of the right guaranteed her by the National Prohibition Act for the return of her property, she having had no notice or knowledge of its unlawful use in the transportation of intoxicating liquor.

The National Prohibition Act (41 Stat. at Large, 305-323, inclusive), provides that:

> "The court upon conviction of the person so arrested shall order the liquor destroyed and *unless good cause to the contrary is shown by the owner*, shall order a sale by public auction of the property seized and the officer making the sale, after first deducting the expense of keeping the property, the fee for the seizure and the costs of the sale, shall pay all liens according to their priorities, which are established by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor." (41 Stat. 315.)

The conflict between the Kansas law and the Act of Congress is clear. Congress has provided for the protection of the innocent owner and also innocent lien holders, and Kansas has sought to destroy it. In other words, the State of Kansas, by legislative enactment, and by judicial inter-

pretation, has taken away a right of a citizen granted and secured to him by an Act of Congress.

Since the protection of appellant's property is guaranteed to her by the National Prohibition Law the State of Kansas cannot, by legislative enactment, or other process, cut off or in any manner impair that right. This rule of law is as old as our National Constitution. Chief Justice MARSHALL expounded this principle in the early history of the Supreme Court of the United States. See *Gibbons* v. *Ogden*, 9 Wheat. (U. S.) 209, 210, and see also *Poindexter* v. *Greenbow*, 114 U. S. 270.

In this situation it cannot be denied that the Act of Congress is supreme over the act of a state legislature on any question where the state law conflicts with the national law. Prior to the adoption of the United States Constitution all of the power of government was in the several states. Upon the adoption of the Constitution the states delegated to the Federal Government certain powers, and in order that there might be no conflict between the states and Federal Government the Constitution of the United States, by the provisions contained therein, is made the supreme law of the land. (Art. 6, Sec. 2, U. S. Constitution; *Gibbons* v. *Ogden*, 9 Wheat. 209, 210.)

When the Eighteenth Amendment was adopted it became a part of the Constitution and therefore became a part of the supreme law of the land. No state has the power to take any action, legislative or otherwise, contrary thereto. When the amendment was adopted, automatically Congress became invested with the power to enforce its provisions:

> "The Congress shall have power * * * to make all laws which shall be necessary and proper for carrying

into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

—(Sec. 8, Art. 1, U. S. Constitution.)

In the case of *James Everard's Breweries* v. *Day*, 265 U. S. 545, 558 and 559, 44 Sup. Ct. 628, it is said:

> "The Constitution confers upon Congress the power to make all laws necessary and proper for carrying into execution all powers that are vested in it. Article 1, Sec. 8, cl. 18. In the exercise of such nonenumerated or 'implied' powers it has long been settled that Congress is not limited to such measures as are indispensably necessary to give effect to its express powers, but in the exercise of its discretion as to the means of carrying them into execution may adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution."

Furthermore, aside from this fundamental rule, the Eighteenth Amendment specifically confers upon Congress the power to enforce "by appropriate legislation" the constitutional prohibition of the traffic in intoxicating liquors for beverage purposes. This enables Congress to enforce prohibition "by appropriate means." *National Prohibition Cases*, page 387 (40 Sup. Ct. 486).

It is interesting to note that the Eighteenth Amendment contains the provision that, "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation. * * * "

Did this add any power to the states? We say not, because the states always had the right and power to enforce

prohibition. (*Mugler* v. *Kansas*, 123 U. S. 623; *Hamilton* v. *Ky. Dist. Co.*, 251 U. S. 146, 40 Sup. Ct. 106.) Under our system of government, there cannot be two equally strong opposing powers, conflicting with each other, but one must be supreme, at least within the limits of its delegated supremacy.

> "In argument, however, it has been contended, that a law passed by a state, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject, and each other, like equal opposing powers. But the framers of our Constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it."
>
> —*Gibbons* v. *Ogden*, 9 Wheat. (U. S.) 209.

Although the state may act, within its territorial limits, in the enforcement of the Eighteenth Amendment, it cannot pass any act in contravention thereof. Now, Congress, in pursuance of the power given to it by the Constitution, has enacted laws providing for the enforcement of the amendment and in so doing it has guaranteed to innocent owners and lienholders the protection of their rights. Those rights the state cannot impair or defeat.

It is said that the states "cannot authorize that which is forbidden by Congress." Congress has specifically forbidden the confiscation of appellant's property, and consequently Kansas cannot authorize that which is inimical thereto. The rights of innocent owners and lienholders under the National Prohibition Law are beyond cavil.

—*U. S.* v. *Slyvester*, 273 Fed. 253;
U. S. v. *Brickley*, 266 Fed. 1001;

The Saxon, 269 Fed. 639;
U. S. v. *One Paige Automobile*, 266 Fed. 425.

IV.

The Supreme Court of Kansas erred in affirming the judgment of the trial court in an action in the District Court of Finney County, Kansas, in which appellant was defendant and appellee was plaintiff, by its decision rendered therein December 5, 1925, in holding that:

> ***(a)*** **"An automobile which the owner places in the possession of another for general use and such other uses it in the unlawful transportation of intoxicating liquors without the knowledge of the owner is subject to forfeiture and condemnation under the statute relating to liquor nuisances, following *The State v. Peterson*, 107 Kan. 641, and *The State v. Stephens*, 109 Kan. 254."**

And also in holding that:

> ***(b)*** **"Officers of experience who found the liquor transported and determnied by the sense of smell and from its appearance that it was strong intoxicating liquor are qualified to testify that it was intoxicating and no error was committed in the admission of such testimony."**

And also in holding that:

> ***(c)*** **"The rule applicable to a guilty automobile in which an innocent third party has a special ownership is equally appropriate to an innocent owner who holds the entire interest in the automobile."**

In the first place, the evidence is undisputed that the automobile in question was not given to Brown or any other person for general use. It is undisputed that Shepherd and

Hedges were given possession of the car to use only as a demonstrator. (R. 10 and 11.) This is the only authority shown anywhere in the record for anybody to use the car. Brown, when he took this car, would have no greater authority to use it for general purposes than Shepherd and Hedges. At the time in question it is undisputed that the owner did not know Brown or any other person was using the car for any purpose. In any event, it stands admitted that the owner did not authorize it to be used for an unlawful purpose and did not know it was being so used, if it was so used, which we emphatically deny. The Kansas Supreme Court holds that the owner had no knowledge that the car was being used for an unlawful purpose. General use would contemplate only a lawful use. This question has been passed on by numerous state and federal courts but not directly by this court.

The Supreme Court of Oklahoma, under a similar statute, has decided the exact question involved in this case, in *Boles, et al.*, v. *State*, 77 Okl. 310, as follows:

> "The unlawful use of an automombile to convey intoxicating liquors by one lawfully in possession of such conveyance does not forfeit the right of the owner to claim and retain such property when it appears that such conveyance was so unlawfully used without the consent, fault or knowledge of its owner."

Also in the case of *Hoskins* v. *State*, 82 Okl. 201, wherein this identical question is discussed and the court decides as follows:

> "The unlawful use of an automobile to convey intoxicating liquors by one lawfully in possession of such conveyance does not forfeit the property when it ap-

pears that such automobile was so unlawfully used without the consent, fault or knowledge of its owner."

See also, *Naylor* v. *Simmons*, 33 Idaho 323, 194 Pac. 94.

The federal courts have also universally so held when the question has been up in any form in those courts. One of the strongest cases in point is that of *United States* v. *One Buick Roadster*, decided in Montana, reported in 280 Fed. 517. We especially invite this court's serious consideration of the reason and logic of this decision in paragraph 3 at page 519, where the court says:

"If the personal penalties by the law visited upon trespasser, thief and violator of section 3450 will not deter him and protect the revenue, forfeiture of the thing of the trespass, theft, and violation will not accomplish it. The latter is not borne by the guilty person, but falls upon the innocent. It is of government's first duties to protect the individual from the trespasser and the thief. When it fails therein, what principle of conduct, custom, law or justice will permit it to aggravate its fault and magnify his loss by forfeiture of his property, the thing of the trespass or theft? A case of misuse by a bailee affords no analogy. The bailee has possession with the owner's consent, the trespasser or thief without it, each the antipodes of the other. The owner takes the hazard of his voluntary act, and responds over for his bailee's misuse of the thing.

"It is not the owner's act that the thing is taken and misused by trespasser or thief. He cannot effectually guard against the latter, but he can against the former. Forfeiture in the former is not an unreasonable penalty for the owner's action which contributed to it, but in the latter is an unreasonable imposition upon mere inaction, devoid of duty, and upon ownership. It is not status but conduct, that is prescribed, proscribed and penalized by law."

U.S. vs One Chevrolet Coupe 9 Fed.2d 85

See, also, U.S. vs Reo Speed Wagon 5 Fed.2d 372

U. S. v. *Two Bbls. Whiskey*, 96 Fed. 479 (C. C. A.);
U. S. v. *Slyvester*, 273 Fed. 253;
Jackson v. *U. S.*, 295 Fed. 620;
Oakland Motor Co. v. *U. S.*, 295 Fed. 626.

In the case of *Goldsmith Jr.-Grant Co.* v. *U. S.*, 254 U. S. 505, cited by the Kansas Supreme Court to sustain its decision, this court expressly refused to pass on the particular question at issue and made use of the following language:

> "We also reserve opinion as to whether the section can be extended to property stolen from the owner, or otherwise taken from him without his privity or consent."

It stands admitted in this case that the car in question was used without the privity or consent of the owner. We, therefore, confidently expect this court to hold that to forfeit the car in question would amount to confiscation, and deprive the owner of her property without due process of law.

There is no competent proof that the liquor in question was intoxicating liquor.

We desire to call special attention to the flimsy testimony in this case on this highly important question. In order that the higher courts might know exactly what the evidence was, we have set out in full by question and answer all of the testimony on this subject, quoting the same exactly as it was given, all of which was received over the objection of claimant (Ol Brown, sheriff, testimony, R. 6 and 7, and Lee Richardson, marshal, testimony R. 7 and

8). This court will observe that it is the merest guess work and the strongest imagination possible to find from this testimony that the bottle that was found by the marshal some distance away from the car off in the weeds somewhere, did in fact contain intoxicating liquor. It is impossible to tell whether or not a liquid is intoxicating simply by its smell and appearance. It is perfectly rediculous to contend otherwise. We are aware of the fact that courts have held when a witness testifies that a certain liquid is "whiskey" or "beer", which is assumed to be intoxicating under certain statutes until the contrary is proven, that evidence of this character is sufficient; but no court has ever before held that a trial court or a jury can assume that fluids or drinks are intoxicating in order to convict people of their unlawful possession or to confiscate property that might be used in their transportation. This court will notice in the testimony given by these two officers that they simply refer to the liquor as "intoxicating liquor," although they claim they had never tasted intoxicating liquor in their lives and did not taste this particular liquor, and knew nothing about how it tasted, but claimed that they could tell it was intoxicating simply by its smell. This is merest guess work and statement of a serious conclusion without any proof whatsoever. The marshal, Richardson, who seemed extremely anxious to be convincing on this question, did say he thought the liquor contained alcohol, but he admitted that he did not know what per cent of alcohol it contained and that there had been no chemical analysis to show what amount of alcohol it did contain (R. 8). Many liquids contain alcohol and are not intoxicating; and the Volstead Act itself permits alcoholic content up to one-tenth of one per cent, and the Kansas laws permit the use and sale of liquor up to the point where it becomes in-

toxicating, which has been frequently scientifically proven to require at least two per cent alcohol.

We submit that these witnesses were simply guessing at the contents of the bottle that was found away off in the weeds somewhere, and that the evidence is too flimsy to justify any court in confiscating the property of an innocent person, the owner of the car. There is not a jury in the world that would convict even a bootlegger on such testimony and Brown, under the undisputed facts in this case, was never before even suspicioned of crime or arrested for anything, and was in this very case actually acquitted of transporting intoxicating liquor in this car at the time in question. Now the jury either believed that the liquor was not intoxicating, or that Brown never had it in the car, and if either contention is correct, the car could not be confiscated. It seems to us that the state is asking too much to attempt to throw new cars on the market to be sold at a sacrifice, and thereby wipe out the owner's interest, on the flimsy evidence in this case, and this court should not permit the order of forfeiture to stand for a single moment on all the evidence in this case. The court will observe that we preserved our rights by proper objection at the time and also by demurrer to the evidence and motion to dismiss (R. 9 and 10).

V.

The Supreme Court of Kansas erred in overruling the motion of appellant for a rehearing in said cause, and in failing to order a dismissal of the action, it appearing from the record that Clyde Brown, the person charged with unlawfully transporting liquor in appellant's automobile in the same action was acquitted of the charge by a jury trial, explicitly and finally determining that no crime was committed in the use of said automobile.

For this assignment alone, if for no other reason, the Supreme Court of Kansas should be required to order a dismissal of this case. It stands admitted that Brown, in the same identical case, when tried for the offense of transporting the praticular liquor in question was acquitted of the charge (R. 30, extract from petition for rehearing). Let us reflect upon this ridiculous and absurd situation. The finding of less than a half pint of liquor, which no one now knows whether it was intoxicating or not, out in the weeds some distance away from where the car was stopped, was of such great importance to the people and good order of the State of Kansas that it is deemed necessary to cause the arrest of Brown for the violation of both the state laws and the ordinances of Garden City, and at the same time to confiscate the car of an innocent owner, when all of the officers admit that they found nothing intoxicating in the car or on the person of Brown. There was a strained effort in the court below to show that Brown had been arrested before to such an extent that the Kansas Supreme Court seemed to so understand the situation when it said in its opinion: "On one occasion when Brown was driving the car he was arrested on the charge that he was unlawfully in the possession of intoxicating liquor, and on an-

other that he was unlawfully transporting intoxicating liquor in the car", but a fair study of the abstract on both sides will show that all of the arrests grew out of this one transaction, and we are satisfied that counsel will so admit in this court as it is the exact truth.

This arrest and seizure was made without a warrant and without reasonable suspicion that a crime was being committed. The statutes of Kansas under which the proceeding was had, requires the issuance of a warrant before the seizure of an automobile. The Fourth Amendment to the Constitution prevents unreasonable seizure, such as was made in this case. See *Carroll, et al.*, v. *United States*, 267 U. S. 132, and particularly the dissenting opinions of Justices McReynolds and Sutherland.

Since the trial of the case by the court against the automobile, and after the decision of the case by the Supreme Court of Kansas, but before passing on the motion for rehearing, Brown was tried on the information filed in this same case (R. 3 and 4) and was found not guilty of the offense of transporting liquor in the car in question, said verdict being returned December 17, 1925, and is as follows, to-wit:

> "We, the jury impaneled and sworn in the above entitled case, do upon our oaths find the defendant guilty of having intoxicating liquor in his possession as charged in the first count of the information. And further find the defendant NOT guilty of the offense of transporting intoxicating liquor as charged in the second count of the information. Geo. E. Dillon, Foreman."

(See information, R. 3 and 4.) (The 3rd and 4th counts were dismissed and the 5th pertains to the automobile in

which this appeal was taken.) So by this trial Brown was found guilty of having in his possession, or rather under his control, the jug of liquor which he had the good sense to leave out in the country northeast of Garden City, where it was found by the sheriff. It is conceded that this jug of liquor was never attempted to be transported in the car in question, but was taken possession of by the sheriff (R. 14).

We, therefore, find the defendant absolutely acquitted from any unlawful use of the car in question and it is consequently clear that the car has been wrongfully and illegally confiscated in this proceeding, for of course, unless it was put to an unlawful use, simply because Brown may have had control of or access to a jug of liquor out in the country could not possibly justify the confiscation of the car when there is no evidence anywhere that any liquor was found in the car or transported therein. This court will certainly not permit the confiscation of an automobile where it has been found by a jury in the same case, under exactly the same state of facts, that it was not being used for the unlawful transportation of the intoxicating liquor in question.

Conclusion.

The search and seizure, under the facts of this case, were unwarranted and unreasonable, and the forfeiture of the car was simply and purely confiscation, taking the property of claimant, Stella Van Oster, without compensation and without due process of law, contrary to the laws and Constitution of the State of Kansas, and the Constitution of the United States.

We, therefore, respectfully submit that the judgment of the Supreme Court of the State of Kansas should be reversed and the lower court required to order a dismissal of the proceedings against the automobile in question, at the costs of the state.

Respectfully submitted,

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August 30, 1926.

APPENDIX.

Revised Statutes of Kansas Annotated, 1923, Kansas Session Laws 1919, ch. 217.

21-2162. *Vehicles or Means of Carriage as Nuisances.* All automobiles, vehicles and other property used in the transportation or carrying of intoxicating liquors into this state or in carrying and transporting intoxicating liquors from one place to another within this state are hereby declared to be common nuisances. (L. 1919, ch. 217, s. 1.; March 20.)

21-2163. *Complaint and Warrant in Such Case.* Upon the filing of a complaint or information charging a common nuisance as above defined, a warrant shall be issued, authorizing and directing the officer to whom it is directed to arrest the person or persons described in said complaint or information, or the person or persons using the automobiles, vehicles and other property for the transportation of intoxicating liquors into this state, or for the transportation or carrying of intoxicating liquors from one place to another within this state, and to seize and take into his custody all such automobiles, vehicles and other property so used which he may find, and safely keep the same subject to the order of the court. In said complaint or information it shall not be necessary to accurately describe the automobile, vehicle or other property so used, but only such description shall be necessary as will enable the officer executing the warrant to identify it properly. (L. 1919, ch. 217, s. 2; March 20.)

21-2164. *Notice to and Answer by Defendant.* Whenever any vehicles, automobiles or other property shall be

seized under such warrant, whether an arrest has been made or not, a notice shall issue within forty-eight hours after the return of the warrant in the same manner as a summons, directed to the defendant or defendants in such action and to all persons claiming any interest in such vehicles, automobiles and other property, fixing a time, to be not less than 60 days, and place at which all persons claiming any interest therein may appear and answer the complaint made against such vehicles, automobiles and other property and show cause why the same should not be adjudged forfeited and ordered sold as hereinafter provided. Such notice shall be served upon the defendant or defendants in the action in the same manner as a summons if they be found within the jurisdiction of the court, and a copy thereof shall also be posted in one or more public places in the county in which the cause is pending. If at the time for filing answer, said notice has not been duly served or other sufficient cause appear, the time for answering may be by the court extended and such other notice issued as will supply any defect in the previous notice and give reasonable time and opportunity for all persons interested to appear and answer. At or before the time fixed by notice, any person claiming an interest in the vehicles, automobiles or other property seized, may file his answer in writing, setting up his claim thereto, and shall thereupon be admitted as a party defendant to the proceedings against such vehicles, automobiles or other property. The complaint or information and answer or answers that may be filed shall be the only pleadings required; and at the time fixed for answer, or at any other time to be fixed by the court, a trial shall be had in a summary manner before the court of the allegations of the complaint or information against the property seized; and whether any answer shall be filed

or not, it shall be the duty of the county attorney to appear and adduce evidence in support of such allegation. (L. 1919, ch. 217, s. 3; March 20.)

21-2165. *Judgment: Destruction of Liquor.* If the court shall find that such vehicles, automobiles or other property or any part thereof were at the time a common nuisance, as defined in section number 1, it shall adjudge forfeited so much thereof as the court shall find was such common nuisance, and shall order the officer in whose custody it is to sell the same publicly, and said officer shall cause notice to be given by publication for at least two weeks in the official county paper of the time and place of the sale of said property and shall file in said court his return showing the sale of said property and the amount received therefor and shall pay the same into court to await the order of the court. The court, if it approves such sale, shall declare forfeited the proceeds of said sale and shall order the money received for said property at said sale paid into the treasury of the county for the support of the common schools, after paying out of the proceeds of said sale the costs of the action, including costs of sale and the keeping and maintenance of said property. All intoxicating liquors found in such vehicles, automobiles or other property seized, together with the bottles, jugs and vessels containing the same, shall by the court be ordered destroyed in the same manner and upon like finding as provided in Laws 1885, chapter 149, section 9. (L. 1919, ch. 217, s. 4; March 20.)

21-2166. *Appeal From Judgment.* Either the state or any defendant or other person claiming the property seized, or an interest therein, may appeal from the judgment of the court in any such proceedings against the property seized in the manner provided for taking appeals in crim-

inal cases. Any claimant of such property who appeals, in order to stay proceedings, must enter into an undertaking with two or more sureties to the State of Kansas, to be approved by the trial court or the clerk thereof, in the sum of not less than one hundred dollars ($100.00) nor less than double the amount of the value of said property as fixed by the court and the costs adjudged against said property, conditioned that he will prosecute his appeal without unnecessary delay, and if judgment be entered against him on appeal he will satisfy the judgment and costs, and no bond shall be required for an appeal by the state, and such appeal shall stay the execution of the judgment. (L. 1919, ch. 217, s. 5; March 20.)

No. 2,778

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

No. ——

STELLA VAN CISE, *Plaintiff in Error,*

vs.

THE STATE OF KANSAS.

In Error to the Supreme Court of the State of Kansas.

Brief for the State of Kansas.

CHARLES B. GRIFFITH,
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CITATIONS.

CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1926.

No. 303.

STELLA VAN OSTER, *Plaintiff in Error,*

vs.

THE STATE OF KANSAS.

No. 31,716.

In Error to the Supreme Court of the State of Kansas.

Brief for the State of Kansas.

STATEMENT.

This case comes to this Court on writ of error to the Supreme Court of the State of Kansas. The decision of that Court is reported in 119 Kan. 874 to 876.

The plaintiff in error, Stella Van Oster, on the 27th day of September, 1924, purchased a Dodge automobile for the sum of $950 from the firm of Sheppherd & Hedges, automobile dealers in the city of Garden City, Kan. (R. 10, 11.) As a part of the purchase agreement she had an understanding with Sheppherd & Hedges that she should leave the car in their garage; that they were to use it in their business and were to keep it up and in running order until the value of the use of the car should amount to the sum of $200, when

for the use of same they were to allow her the sum of $200 on the purchase price. (R. 10.)

Clyde Brown was in business in Cimarron, Kan., handling tractors for the firm of Sheppherd & Hedges, of Garden City. (R. 9.) He used the automobile belonging to Mrs. Van Oster in his business, and took it from the garage at Garden City on many occasions. (R. 16.) This he did with the knowledge and consent of plaintiff in error, as is shown by her testimony to the effect that she know he had driven the car so many times she could not state just how many (R. 15); by testimony of Mr. Hedges that Clyde Brown generally brought the car in and took it out; that he took the car whenever he chose and that he drove the car in transacting his business (R. 16); by the testimony of Clyde Brown that he used the car in his business part of the time and that he did not ask Mrs. Van Oster every time he wanted to use it; that he needed it in his business (R. 16); and by the testimony of other witnesses that Clyde Brown drove the car repeatedly, and they supposed the car belonged to him (R. 16).

On the evening of March 28, 1925, Brown was driving Mrs. Van Oster's car. He drove to and stopped at a point northeast of Garden City, where the sheriff found a jug of liquor. (R. 14.) The sheriff and his deputy sheriff followed Brown from that spot into the city of Garden City, and there they ordered Brown to stop, and finally stopped him by crowding him to the curb (R. 14, 15), but before stopping, he threw a bottle of liquor out of the car (R. 15), which liquor was picked up by the officers and later introduced in evidence in this case. (R. 9.)

An information was filed charging that Brown used Mrs. Van Oster's car in the illegal transportation of intoxicating liquor, and that the car thereby became a nuisance. (R. 4.) A hearing was held as provided by the Kansas statute and the car was found to be a common nuisance, was forfeited and ordered sold. From these

proceedings Mrs. Van Oster appealed to the Supreme Court of the State of Kansas, where the decision of the lower court was affirmed. (R. 17.)

After the State Supreme Court had affirmed the decision of the trial Court, but before plaintiff in error filed her petition for a rehearing, Clyde Brown, who had been charged in a criminal proceeding with the illegal transportation of intoxicating liquors, which charge was based on the same transaction as the present case against the automobile, was acquitted by a jury. (Extract from petition for rehearing.) After this acquittal of Clyde Brown Mrs. Van Oster in her petition for a rehearing asked the Supreme Court of Kansas to dismiss this case, basing her request upon the acquittal of Brown.

Plaintiff in error brings the case before this Court on a writ of error to the Kansas Supreme Court, relying upon the following points (R. 27):

1. That the Kansas statute as interpreted by the Supreme Court of Kansas is not a reasonable exercise of the State's police power, and is a taking of private property without just compensation and without due process of law, and is in violation of the Fourteenth Amendment to the Constitution of the United States.

2. That the Kansas law, interpreted to deprive the owner of an automobile when the same is used without the knowledge or authority of the owner in the transportation of intoxicating liquor is unconstitutional and invalid, because it deprives the owner of his property without compensation and without due process of law.

3. That the Kansas law is invalid for the reason that it deprives plaintiff in error of a right guaranteed her by the National Prohibition Act, to wit: The right to return of her property, she having had no notice or knowledge of its unlawful use in the transportation of intoxicating liquor.

4. That the Supreme Court of Kansas erred in holding that officers of experience, who found the liquor transported and determined by the sense of smell and from its appearance that it was strong and intoxicating liquor, are qualified to testify that it was intoxicating.

5. That the Supreme Court of Kansas erred in holding that the car could be confiscated even though the defendant in separate proceedings, after the forfeiture proceedings, had been acquitted of the criminal charge of transporting intoxicating liquors.

These assignments of error and points relied upon by plaintiff raise the following questions:

1. Are the provisions of the Kansas statute, as interpreted by the Supreme Court of Kansas, in conflict with the provisions of the Fourteenth Amendment to the Constitution of the United States?

2. Are the provisions of the Kansas statute, as interpreted by the Supreme Court of Kansas, in conflict with the provisions of the National Prohibition Act?

3. Is the forfeiture of the property of plaintiff in error provided by the law of Kansas dependent upon the conviction of the person charged in a criminal proceeding with using the property in illegally transporting intoxicating liquors?

4. Was it proper for the Court to consider the testimony of the police officers as to the nature of the liquors transported in the automobile?

In addition to and not included in the questions presented by the assignments of error and the points to be relied upon as they appear in the printed record, plaintiff in error in her brief presents the following propositions: First. That the Kansas statute is unconstitutional because it denies to plaintiff in error a jury trial. Second. That the seizure of the car was unreasonable, and therefore unconstitutional.

SUMMARY OF ARGUMENT.

1. The Kansas Law is not in conflict with the Fourteenth Amendment.

a. The Federal Government under its power to tax can forfeit the interest of innocent parties in property used to violate the provisions of the Internal Revenue Laws.

Dobbins Distillery v. U. S., 96 U. S. 395.
U. S. v. Stowell, 133 U. S. 1, 10 Sup. Ct. Rep. 244.
Goldsmith, Jr., Grant Co. v. U. S., 254 U. S. 505, 41 Sup. Ct. Rep. 189.
U. S. v. Two Bay Mules, 36 Fed. 84.
U. S. v. 220 Patented Machines, 99 Fed. 559.
U. S. v. 246½ Pounds Tobacco, 103 Fed. 791.
U. S. v. One Black Horse, 129 Fed. 167.
U. S. v. Mincey, 254 Fed. 287.
U. S. v. One Saxon Automobile, 257 Fed. 251.

b. What the Federal Government can do without violating the due process clause of the Fifth Amendment the State can do without violating the due process clause of the Fourteenth Amendment. Therefore the State can forfeit property of innocent parties used in violating State tax laws.

Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. Rep. 111.
French v. Barber Asphalt Co., 181 U. S. 324, 21 Sup. Ct. Rep. 625.
Hibben v. Smith, 191 U. S. 310, 24 Sup. Ct. Rep. 88.
Carroll v. Greenwich Ins. Co., 199 U. S. 401, 26 Sup. Ct. Rep. 66.

c. What can be done under the State's power to tax can also be done under its police power. That is to say, the constitutional restrictions on the police power of a state are no greater than the restrictions on its power to tax. Therefore the State law,

which forfeits property of innocent parties when used in violating a law passed under the State's police power, is a valid law.

Kidd v. Pearson, 123 U. S. 1, 9 Sup. Ct. Rep. 6.
Western Union Telegraph Co. v. Mayor of New York, U. S. C. C. (S. D. N. Y.) April 12, 1889, 3 L. R. A. 449.
U. S. v. One Buick Roadster, 244 Fed. 961.
6 Ruling Case Law, 193.

d. Statutes similar to the Kansas statute have been held constitutional in State and United States courts.

Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273.
Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. Rep. 499.
U. S. v. One Buick Roadster, 244 Fed. 961.
U. S. v. One Seven-passenger Paige Car, 259 Fed. 641.
White Auto Co. v. Collins, 136 Ark. 81, 206 S. W. 748.
Robinson Car Co. v. Ratekin, 104 Neb. 369, 177 U. S. 337.
Sandlovich v. Hawes, 113 Neb. 374, 203, N. W. 541.
King v. Commonwealth, 127 Va. 800, 102 S. E. 757.
Pennington v. Commonwealth, 127 Va. 803, 102 S. E. 758.

e. The Kansas statute is a necessary and proper exercise of the state's police power, and the forfeiture provisions are necessary to prevent the unlawful transportation of intoxicating liquors.

Dobbins Distillery v. U. S., 96 U. S. 395.
Yick Wo. v. Hopkins, 118 U. S. 556, 6 Sup. Ct. Rep. 1064.
Powell v. Pennsylvania, 127 U. S. 677, 8 Sup. Ct. Rep. 922.
United States v. Stowell, 133 U. S. 1, 10 Sup. Ct. Rep. 244.
Lawton v. Steele, 152 U. S. 140, 14 Sup. Ct. Rep. 502.
L'Hote v. New Orleans, 177 U. S. 587, 20 Sup. Ct. Rep. 788.
Cunnius v. Reading School Dist., 198 U. S. 469, 25 Sup. Ct. Rep. 721.
Goldsmith, Jr., Grant Co. v. U. S., 254 U. S. 505, 41 Sup. Ct. Rep. 189.
U. S. v. One Buick Roadster, 244 Fed. 961.
U. S. v. One Seven-passenger Paige Car, 259 Fed. 641.
State v. Peterson, 107 Kansas 641.

f. The rule applies to innocent owners in certain cases the same as it does to innocent mortgages, and the automobile of plaintiff in

error, who permitted it to be used by another in his general business, is subject to forfeiture when used by such other in transporting intoxicating liquors in violation of law, and the plaintiff in error, having placed the car in the possession of the one who used it unlawfully cannot complain of the forfeiture.

Dobbins Distillery v. U. S., 96 U. S. 395.
Goldsmith, Jr., Grant Co. v. U. S., 254 U. S. 505, 41 Sup. Ct. Rep. 189.
U. S. v. Two Bay Mules, 36 Fed. 84.
U. S. v. 220 Patented Machines, 99 Fed. 559.
U. S. v. One Black Horse, 129 Fed. 167.
U. S. v. Mincey, 254 Fed. 287.
Sandlovich v. Hawes, 113 Neb. 374, 203 N. W. 541.

g. The cases cited by plaintiff in error in support of the proposition that the Kansas statute is not a reasonable exercise of the State's police power and is a violation of the Fourteenth Amendment to the Constitution of the United States, do not sustain that proposition. The cases cited are:

National Bond and Investment Co. v. Gibson, Sheriff, 6 Fed. 2d Ser. 288.
U. S. v. Two Barrels of Whisky, 96 Fed. 479.
U. S. v. Sylvester, 273 Fed. 253.
U. S. v. One Buick Roadster, 280 Fed. 517.
Jackson v. U. S., 295 Fed. 620.
Oakland Motor Co. v. U. S., 295 Fed. 626.
Naylor v. Simmons, 33 Idaho 323, 194 Pac. 94.
Boles v. State, 77 Okla. 310.
Hoskins v. State, 82 Okla. 201.

2. The Kansas law is not in conflict with the National Prohibition Act.

Vigiolotti v. Commonwealth of Pa., 258 U. S. 403, 42 Sup. Ct. Rep. 330.
U. S. v. Lanza, 260 U. S. 377, 43 Sup. Ct. Rep. 141.
Ex Parte Ramsey, 265 Fed. 950.
Shreveport v. Marx, 148 La. 31, 86 So. 602, 11 A. L. R. 1320.
State of Maine v. Arthur Guathier, 121 Me. 552, 118 Atl. 380, 26 A. L. R. 652.

Commonwealth of Mass. v. Florence Nickerson, 236 Mass. 281, 128 N. E. 273, 10 A. L. R. 1568.
33 Corpus Juris, 501, 503, 505.

3. The proceedings against the automobile are not dependent upon or affected by the criminal proceedings against the user, and the finding of the jury in the criminal prosecution that the driver is not guilty of the charge of transporting intoxicating liquors has no effect upon the proceeding in this case against the car. The proceedings against the person in the criminal case and those against the property of plaintiff in error are separate and distinct proceedings, between different parties, and one does not depend upon the other.

Duncan v. State, 149 Ga. 195, 99 S. E. 612.
Regandez v. State, 171 Ind. 387, 86 N. E. 449.
Saunders v. State of Iowa, 2 Ia. 230, 278.
State v. Learned, 47 Me. 426.
State v. Miller, 48 Me. 576.
State v. McCann, 61 Me. 116.
State v. Intoxicating Liquors, 53 Utah 171.
33 Corpus Juris, 684.

4. The testimony of officers of experience that they found the liquor, smelled it, and from its appearance and smell it was intoxicating, was, in connection with the facts of the case, properly admitted by the trial court.

Strange v. State, 5 Ala. 164, 59 So. 691.
Borders v. City of Macon, 18 Ga. App. 333, 90 S. E. 989.
Rush v. Commonwealth, 20 Ky. Law Rep. 775, 47 S. W. 585.
Commonwealth v. Joseph Leo, 18 Mass. 110.
Commonwealth v. John Dawdican, 114 Mass. 257.
State v. Drew, 38 Vt. 387.

5. The fact that a jury trial is not provided by the Kansas act does not make the act unconstitutional and void.

Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678.
Fairfield v. Gallitin, 100 U. S. 47, 25 L. Ed. 544.
Mugler v. Kansas, 123 U. S. 623.

Ellenbecker v. District Court (Plymouth County), 134 U. S. 31, 33 L. Ed. 801, 10 Sup. Ct. Rep. 424.
Lawton v. Steele, 152 U. S. 133, 38 L. Ed. 385.
French v. Barber Asphalt Paving Co., 181 U. S. 324, 21 Sup. Ct. Rep. 625, 45 L. Ed. 879.
State of Ohio, ex rel., v. Dollison, 194 U. S. 447, 48 L. Ed. 1062.
Campbell v. State, 171 Ind. 702, 87 N. E. 212.
State v. Lee, 113 Kan. 462.
State v. Kelly, 57 Mont. 123, 187 Pac. 637.
Ex Parte Keller, 45 S. C. 537, 31 L. R. A. 678.
State v. Intoxicating Liquor, 55 Vt. 82.
State v. Intoxicating Liquor, 82 Vt. 287, 73 Atl. 586.

6. The seizure of the property in this case was not unreasonable and did not violate any right of plaintiff in error.

Ellenbecker v. District Court, 134 U. S. 31, 33 L. Ed. 801.
State of Ohio, ex rel., v. Dollison, 194 U. S. 447, 48 L. Ed. 1062.
Carroll et al. v. U. S., 267 U. S. 132, 69 Law Ed. 543.
U. S. v. Murphy, 264 Fed. 842.
Ex Parte Howell, 267 Fed. 997.
United States v. Borkowski, 268 Fed. 408.
Kathriner v. U. S., 276 Fed. 808.
Elrod v. Mass., 278 Fed. 123.
U. S. v. Bateman, 278 Fed. 231, 234.
In re Mobile, 278 Fed. 949.
O'Conner v. United States, 281 Fed. 396.
Lambert v. U. S., 282 Fed. 413.
Vachina v. United States, 283 Fed. 35.
McBride v. United States, 284 Fed. 416.
U. S. v. Hilsinger, 284 Fed. 585.
U. S. v. Rembert, 284 Fed. 996.
Bell v. U. S., 285 Fed. 145.
U. S. v. Kaplan, 286 Fed. 936.
U. S. v. Daison, 288 Fed. 199.

THE KANSAS LAW.

The Kansas statute, as interpreted by the Supreme Court of Kansas, provides for the forfeiture of all automobiles used in unlawful transportation of intoxicating liquors, and such forfeiture includes the interest of an owner who places an automobile in the hands of another for a lawful purpose, which other, without the knowledge or consent of the owner, uses the automobile in the illegal transportation of intoxicating liquors.

THE STATUTE.

The statute in question, Sec. 21-2162 to 21-2167, Revised Statutes of Kansas, 1923, Laws of Kansas, 1919, ch. 217, Secs. 1 to 6, reads as follows:

> "SEC. 21-2162. All automobiles, vehicles and other property used in the transportation or carrying of intoxicating liquors into this state or in carrying and transporting intoxicating liquors from one place to another within this State are hereby declared to be common nuisances.
>
> "SEC. 21-2163. Upon the filing of a complaint or information charging a common nuisance as above defined, a warrant shall be issued, authorizing and directing the officer to whom it is directed to arrest the person or persons described in said complaint or information or the person or persons using the automobiles, vehicles and other property for the transportation of intoxicating liquors into this State, or for the transportation or carrying of intoxicating liquors from one place to another within this State, and to seize and take into his custody all such automobiles, vehicles and other property so used which he may find, and safely keep the same subject to the order of the Court. In said complaint or information it shall not be necessary to accurately describe the automobile, vehicle or other property so used, but only such description shall be necessary

as will enable the officers executing the warrant to identify it properly.

"SEC. 21-2164. Whenever any vehicles, automobiles or other property shall be seized under such warrant, whether an arrest has been made or not, a notice shall issue within forty-eight hours after the return of the warrant in the same manner as a summons, directed to the defendant or defendants in such action and to all persons claiming any interest in such vehicles, automobiles and other property, fixing a time, to be not less than sixty days, and place at which all persons claiming any interest therein may appear and answer the complaint made against such vehicles, automobiles and other property and show cause why the same should not be adjudged forfeited and ordered sold as hereinafter provided. Such notice shall be served upon the defendant or defendants in the action, in the same manner as a summons if they be found within the jurisdiction of the court, and a copy thereof shall also be posted in one or more public places in the county in which the cause is pending. If at the time for filing answer said notice has not been duly served or other sufficient cause appear, the time for answering may be by the court extended and such other notice issued as will supply any defect in the previous notice and give reasonable time and opportunity for all persons interested to appear and answer. At or before the time fixed by notice, any person claiming an interest in the vehicles, automobiles or other property seized may file his answer in writing, setting up his claim thereto, and shall thereupon be admitted as a party defendant to the proceedings against such vehicles, automobiles or other property. The complaint or information and answer or answers that may be filed shall be the only pleadings required; and at the time fixed for answer, or at any other time to be fixed by the Court, a trial shall be had in a summary manner before the Court of the allegations of the complaint or information against the property seized; and whether any answer shall be filed or not, it shall be the duty of the county attorney to appear and adduce evidence in support of such allegation.

"SEC. 21-2165. If the Court shall find that such vehicles, automobiles or other property or any part thereof were at the time a common nuisance, as defined in section No. 1, it shall adjudge forfeited so much thereof as the court shall find was such common nuisance, and shall order the officer in whose

custody it is to sell the same publicly, and said officer shall cause notice to be given by publication for at least two weeks in the official county paper of the time and place of the sale of said property and shall file in said Court his return showing the sale of said property and the amount received therefor and shall pay the same into Court to await the order of the Court. The Court, if it approves such sale, shall declare forfeited the proceeds of said sale and shall order the money received for said property at said sale paid into the treasury of the county for the support of the common schools, after paying out of the proceeds of said sale the costs of the action, including costs of sale and the keeping and maintenance of said property. All intoxicating liquors found in such vehicles, automobiles or other propery seized, together with the bottles, jugs and vessels containing the same, shall by the Court be ordered destroyed in the same manner and upon like finding as provided in Laws 1885, chapter 149, section 9."

The provisions of sec. 21-2166 and sec. 21-2167 are not necessary to our consideration of the statute and are not quoted.

DECISIONS OF THE SUPREME COURT OF KANSAS.

Sec. 21-2165 is the section pertinent to the present inquiry. This section provides for the sale of the vehicle used unlawfully and the forfeiture to the State of the proceeds of the sale. This section has been interpreted by the Kansas Supreme Court in the cases of *State v. Peterson*, 107 Kan. 641, and *State v. Stephens*, 109 Kan. 254, to forfeit all interests of whatever kind in the vehicle which is unlawfully used. The innocent owner who has placed his car in the hands of another for a legal purpose, which other then uses it illegally, has no protection under this statute.

In the case of *State v. Peterson*, 107 Kan. 641, an automobile, having been used to transport intoxicating liquors unlawfully, was proceeded against as a common nuisance under the above statute. The mortgagee answered, and it appeared that it took the mortgage on the car in good faith; that it was innocent of any wrongdoing;

that it had no knowledge that the car was used to violate the law. Under these facts the mortgagee contended that its interest under its mortgage should be protected, and in support of this contention claimed the statute, if it deprived it of its interest in the automobile, to be unconstitutional and in violation of the Fourteenth Amendment, in that it deprived it of its property without due process of law. In that case the Court said:

> "In our opinion . . . it is within the police power of the State to provide for the forfeiture of property used in violation of a criminal statute and to provide expressly that the rights of an owner, or mortgagee, however innocent of the intent or purpose for which the property is to be used, shall be forfeited, and such a law is not open to the objection that it violates the Fourteenth Amendment by taking property without due process of law.
>
> "Doubtless the Legislature realized that any provision for the protection of a lien of a mortgagee would open the door to collusion and afford a ready means of evading the law. How readily such a provision might be used for defeating the purpose for which the law was enacted is apparent when we consider that any person desiring to engage in the illegal transportation of intoxicating liquors could, by placing an incumbrance upon an automobile, minimize the financial investment and hazard of the business. The history of our statute, which shows that the Legislature declined, after full consideration of the subject, to make provision for the protection of mortgagees or other lien holders, makes it, in our opinion quite clear that the statute should be construed the same as if it had expressly provided that the holder of a valid chattel mortgage should not be protected."

In the case of *State v. Stephens*, 109 Kan. 254, the same question is presented. The interpleader attacks the Kansas law on the ground that it is deprived of its property without due process of law and the statute violates the provisions of the Fourth Amendment. The Court, in deciding the case against the interpleader, refers to

and approves the decision in the case of *State v. Peterson*, supra, and says:

> "Our statute says without qualification that automobiles used for the purpose of transporting intoxicants unlawfully are common nuisances and forfeitures shall be adjudged thereon. Such property, so used, is a nuisance. The forfeiting of the interest of a chattel mortgage holder in property unlawfully used is merely one of the more or less regrettable, but nevertheless necessary, results incidental to the proper execution of the judgment."

In the present case (*State v. Van Oster*, 119 Kan. 874) a question a little different from that decided in the preceding cases is presented. The State now asks that the interest of an owner be forfeited, the owner being innocent of any wrongful use to which her vehicle was put, but having permitted another to use the car for a lawful purpose, which other then uses the car in the illegal transportation of intoxicating liquor. The Court decided that under the provisions of the statute the owner must suffer. The following is quoted from the opinion of the State Court (R. 20 and 21):

> "Other testimony showed that Brown took and used the car at will and was driving it on the streets continually, and some witnesses saw him drive it almost every day. Mrs. Van Oster knew, and in fact could not avoid knowing, that he was using the car in his business generally and almost continuously. It was not an isolated instance of Brown taking and using the car on the day of his arrest, without the knowledge of Mrs. Van Oster, but was a general use with the permission of the owner for a long period of time. We need not determine whether a forfeiture may be adjudged in supposed cases where cars are stolen or taken without any knowledge or permission of the owners. Here there was both knowledge and permission for general use and the case falls within the rule of cases previously decided.
>
> . . . . . .
>
> "The rule applicable to a guilty automobile in which an innocent third party has a special ownership is equally appropriate to an innocent owner who holds the entire interest in the

automobile. We see no reason to depart from the rule in the earlier decisions nor to reopen the discussion of the principles applied."

Plaintiff in error contends that such construction of the statute makes the statute void because it conflicts with the provisions of the Fourteenth Amendment to the Constitution of the United States and with the National Prohibition Act. (41 Stat. at Large 315.)

The State of Kansas contends that the Kansas statute, when interpreted to forfeit the interest of an owner who places her automobile in the hands of another for a lawful purpose, which other then uses the car in the illegal transportation of intoxicating liquors, is a valid statute and does not deprive such owner of her property without due process of law, is not in conflict with the Fourteenth Amendment to the Constitution of the United States and is not in conflict with the National Prohibition Act.

ARGUMENT AND DISCUSSION OF AUTHORITIES.

1. The Kansas Law Is Not in Conflict With the Fourteenth Amendment.

a. The Federal Government under its power to tax can forfeit the interest of innocent parties in property used to violate the provisions of the internal revenue laws.

In the case of the *Dobbins Distillery v. U. S.*, 96 U. S. 395, the Court held that where the owner of a distillery and other property connected therewith, leased it for the purpose of distilling, the acts or commissions of the lessee in carrying on the business with the intent to defraud the Government, although unknown to the owner, subject the distillery and such other property to forfeiture to the United States, and in this case the Court quotes from the opinion of Chief Justice Marshall in the case of *U. S. v. The Little Charles*, 1 Brock, 347, as follows:

> "That the proceeding was one against the vessel for an offense committed by the vessel, which is not less an offense, and does not less subject her to forfeiture because it was committed without the authority and against the will of the owner."

In the case of the *United States v. Stowel*, 133 U. S. 1, 10 Sup. Ct. Rep. 244, the Court had under consideration a statute (Com. St. 1918, sec. 6021, Rev. St. 3281, as reënacted act; Feb. 8, 1875, c. 36, sec. 16, 18 St. 310), which provides when a person carries on the business of a distillery without giving bond, and with the intent to defraud the United States, there shall be forfeited the personal property found in the distillery or in any building, room, yard, or inclosure connected therewith and used with or constituting a part of the premises. In that case it was held that this forfeiture was not limited to property owned by the distiller, but also applied to

property sold by the distiller to a third person before the illegal use but left in the possession of the distiller, and in his possession at the time of the illegal use, although the owner had no participation in or knowledge of such use.

J. W. Goldsmith, Jr., Grant Co. v. United States, 254 U. S. 505, 41 Sup. Ct. Rep. 189, is a comparatively recent case in which this question is discussed and decided. In this case one Hudson automobile was used by three persons in the removal, deposit and concealment of 58 gallons of distilled spirits upon which a tax was imposed and had not been paid, which removal and deposit and concealment was with the intent to defraud the United States of the tax. This was in violation of a statute (Comp. St. 1918, sec. 6352, Rev. St. sec. 3450), which reads as follows:

> "Whenever any goods in respect whereof any tax is or shall be imposed are removed, or are deposited or concealed in any place with intent to defraud the United States of such tax, such goods shall be forfeited and every conveyance used in the removal or for the deposit or concealment thereof shall be forfeited."

The Grant Company sold the automobile in question to the users and retained title thereto under a conditional sales contract. It was innocent of any participation in or knowledge of the illegal use of the automobile. It intervened and pleaded against the condemnation and forfeiture of the automobile the Fifth Amendment to the Constitution of the United States, claiming that the statute deprived it of its property without due process of law. The Court held the statute to be constitutional and in its opinion said:

> "If the case were the first of its kind, it and its apparent paradoxes might compel a lengthy discussion to harmonize the section with the accepted tests of human conduct. Its words taken literally forfeit property illicitly used though the owner of it did not participate in or have knowledge of the illicit use. There is strength, therefore, in the contention that if such be the

inevitable meaning of the section, it seems to violate that justice which should be the foundation of the due process of law required by the Constitution. It is, hence, plausibly urged that such could not have been the intention of Congress; that Congress necessarily had in mind the facts and practices of the world, and that in the conveniences of business and of life, property is often put into the possession of another than its owner. And it follows, is the contention, that Congress only intended to condemn the interest the possessor of the property might have to punish his guilt, and not to forfeit the title of the owner who was without guilt.

"Regarded in this abstraction the argument is formidable, but there are other and militating considerations. Congress must have taken into account the necessities of the Government, its revenues and policies, and was faced with the necessity of making provision against their violation or evasion. In breaches of revenue provisions some forms of property are facilities, and therefore it may be said that Congress interposes the care and responsibility of their owners in aid of the prohibitions of the law and its punitive provisions, by ascribing to the property a certain personality, a power of complicity and guilt in the wrong.

"But whether the reason for section 3450 be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced. *Dobbins Distillery v. United States*, 96 U. S. 395, 24 L. Ed. 637, is an example of the rulings we have before made. It cites and reviews prior cases, applying their doctrine and sustaining the constitutionality of such laws. It militates, therefore, against the view that section 3450 is not applicable to a property whose owner is without guilt. In other words it is the ruling of that case, based on prior cases, that the thing is primarily considered the offender. And the principle and practice have examples in admiralty. (*The Palmyra*, 12 Wheat 1, 6 L. Ed. 531.)

"It is the illegal use that is the material consideration, it is that which works the forfeiture, the guilt or innocence of its owner being accidental. If we should regard simply the adaptability of a particular form of property to an illegal purpose, we should have to ascribe facility to an automobile as an aid to the violation of law. It is a 'thing' that can be used in the

removal of 'goods and commodities,' and the law is explicit in its condemnation of such things."

In the case of *U. S. v. Two Bay Mules*, 36 Fed. 84, W. H. York, the owner of two mules and a wagon, hired the same to Nick York for the sum of $2.50 per day, for the purpose of hauling produce to market. Nick York, without the knowledge or consent of the owner, used the mules in the removal of spirituous liquors in violation of law (Rev. St. U. S. 3450), which statute expressly provides that property so used shall be forfeited to the United States. Under proper proceedings the property was declared forfeited and the claim of the innocent owner that his property should not be taken from him was denied.

In the case of the *United States v. 220 Patented Machines*, 99 Fed. 559, the Court had under consideration a statute (Comp. St. 1918, sec. 6210, Rev. St. 3409) which provides when a cigar manufacturer violates the provisions of the internal revenue law relating to his business, in addition to other penalties, there shall be forfeited to the United States all machinery, tools, and so forth, "which shall be found in his possession and used in his business." The Court in this case held that the fact that the machinery so used was leased from a third person, who was ignorant of the illegal use, did not prevent its forfeiture, provided the owner must be held to have acted with the knowledge that the property would be subject to forfeiture if the business was conducted illegally.

The decision of the Court in the case of *United States v. 246½ Pounds of Tobacco*, 103 Fed. 791, involves the same statute considered in the case of *U. S. v. 220 Patented Machines*, just referred to. In this case there was on the property sought to be forfeited a *bona fide* mortgage, but the property was allowed to remain in possession of the manufacturer and to be used in his business. The Court held that the mortgagee assumed the risk of unlawful use,

and if the manufacturer violated the law the property should be forfeited and the interest of the innocent mortgagee disregarded.

In the case of *U. S. v. One Black Horse et al.*, 129 Fed. 167, the Court in construing Rev. St. sec. 3061 (U. S. Comp. St. 1901, p. 2006) and sec. 3062 (U. S. Comp. St. 1901, p. 2007), which statute provides for the seizure and forfeiture of vehicles used in introducing into the United States merchandise subject to duty contrary to law, held that the forfeiture applied to a vehicle owned and left by a liveryman, and used in violation of law, though the liveryman had no knowledge of the purpose for which it was to be used.

In the case of the *United States v. Mincey*, 254 Fed. 287, the owner of an automobile sent an employee therewith on a lawful errand, and the employee used the automobile in removing distilled spirits on which the tax had not been paid, with intent to defraud the United States, contrary to the provisions of Comp. St. 1918, 6352, R. S. 3450, all without the knowledge or consent of the owner of the automobile. The Court held that the automobile was subject to forfeiture and the innocent owner had no protection.

The Court in the case of *United States v. One Saxon Automobile*, 257 Fed. 251, deals with this same statute. (Comp. St. 1918, 6352, R. S. 3450.) In this case an automobile had been used in removing liquor on which the tax had not been paid, with the intent to defraud the Government of the tax. The Court held that this automobile is subject to forfeiture under the above statute as against a mortgage taken by the seller of the machine, who voluntarily gave possession to the purchaser, but who had no knowledge of its unlawful use. In this case the Court says:

> "This reasoning does not apply when the owner voluntarily parts with his possession and entrusts his vehicle to another, for in that case the owner is charged with the knowledge that the person to whom he has relinquished possession, or some one acquiring the possession from him, may so use the property as

to defeat the collection of the revenue and thus bring it under the condemnation of forfeiture."

b. What the Federal Government can do without violating the due process clause of the Fifth Amendment, the State can do without violating the due process clause of the Fourteenth Amendment.

That part of the Fifth Amendment which applies to the present question reads as follows:

> "No person shall be deprived of life, liberty, or property without due process of law."

This amendment of course is a restriction upon the Federal Government.

The Fourteenth Amendment, which is a restriction upon the State, contains the following provision:

> "Nor shall any State deprive any person of life, liberty or property without due process of law."

From a reading of the two amendments there should be no room for doubt that the restrictions of the Fifth Amendment on the Federal Government are the same as those of the Fourteenth on the State. In other words, what the Federal Government can do in forfeiting property used unlawfully, without running counter to the Fifth Amendment, the State can do without coming in conflict with the Fourteenth Amendment.

In the case of *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. Rep. 111, the Court uses the following language:

> "The conclusion is equally irresistible that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the State, it was used in the same sense and with no greater extent, than in the Fifth Amendment."

The following is from the opinion of the Court in the case of *French v. Barber Asphalt Co.*, 181 U. S. 324, 21 Sup. Ct. Rep. 625:

> "However, we shall not attempt to define what it is for a State to deprive a person of life, liberty or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State and exclude those which are not, but shall proceed, in the present case, on the assumption that the legal import of the phrase, 'due process of law,' is the same in both amendments. Certainly it cannot be supposed that by the Fourteenth Amendment it was intended to impose on the State, when exercising their powers of taxation, any more rigid or stricter curb than that imposed on the Federal Government in a similar exercise of power by the Fifth Amendment."

And again, the Supreme Court of the United States has expressed this same rule in the case of *Hibben v. Smith*, 191 U. S. 310, 24 Sup. Ct. Rep. 88, in this manner:

> "The Fourteenth Amendment, it has been held, legitimately operates to extend to the citizens and residents of the State the same protection against arbitrary State legislation, affecting life, liberty and property, as is offered by the Fifth Amendment against similar legislation by Congress."

And the Court said in the case of *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 26 Sup. Ct. Rep. 66:

> "Ordinarily if an act of Congress is valid under the Fifth Amendment it would be hard to say that a State law in like terms was void under the Fourteenth."

It follows, from the expressions of the Supreme Court of the United States above quoted, that the State may go as far in the exercise of its power to tax as the Federal Government can go under its power to tax, and is restricted by the Fourteenth Amendment to no greater extent than the Federal Government is restricted by the Fifth Amendment. The State can, therefore, if it desires, pass a law providing for the forfeiture of an automobile used to violate the State tax laws with the intent to deprive the State of the tax, and under this law the State can forfeit the interest of an innocent owner or mortgagee, and in so doing the State does not deprive the

owner or mortgagee of his property without due process of law and does not violate the Fourteenth Amendment.

c. What can be done under the State's power to tax can also be done under its police power. That is to say, the constitutional restrictions on the police power of a State are no greater than the restrictions on its power to tax.

In the case of *Kidd v. Pearson*, 123 U. S. 1, 9 Sup. Ct. Rep. 6, the constitutionality of an Iowa law was attacked. The law prohibited the manufacture of intoxicating liquor and made the sale of liquor a nuisance, and forfeited the property used in violation of the law. It was held in this case that the state under its police power could pass such a law without violating the Fourteenth Amendment and without infringing upon the rights guaranteed by the Federal Constitution and laws, even though the liquor was manufactured to be shipped outside the State. In this case, which raised a question under the police power, the Court in making its decision relied upon the rule established in the case of *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. Rep. 475, where the question was raised under the power of taxation. In the case of *Coe v. Errol*, certain logs cut at a place in New Hampshire had been hauled to the town of Errol in that State for the purpose of transportation beyond the limits of that State, to Lewiston, Me., and were held at Errol for a convenient opportunity for such transportation. The selectmen of the town of Errol assessed the logs for state, county, town and school taxes. The question before the Court was whether these logs were liable to be taxed like other property in the State of New Hampshire. It was claimed by the owners of the logs that they should not be so taxed, as they were being held there awaiting transportation outside the State. The Court held that the logs, although they were to be shipped outside the State, were subject to taxation as a part of the property of the State, until "they had been shipped or entered with a common

carrier for transportation in a continuous route or journey." The Court in the case of *Kidd v. Pearson*, relying upon the principle established in the Errol case, which it will be remembered had to do with the power of the State to tax, spoke as follows:

> "The application of the principles above announced to the case under consideration leads to a conclusion against the contention of the plaintiff in error. The police power of the State is as broad and plenary as its taxing power, and property within the State is subject to the operations of the former so long as it is within the regulating restrictions of the latter."

The Court in the case of *Western Union Telegraph Co. v. Mayor of New York*, U. S. C. C. (S. D. N. Y.) April 12, 1889, 3 L. R. A. 449, said:

> "The subordination of the property rights of the owner to the just exercise of the police power of the State is as complete as it is to the taxing power of the State which requires him to contribute his proportion of the burden of taxation. Indeed the two powers of regulation are coördinate and coëxtensive, and the limitations of one may well be ascertained by the limitations upon the other."

The case of the *United States v. One Buick Roadster*, 244 Fed. 961, is one of the cases dealing with the introduction of intoxicating liquor into the Indian country, which will be referred to in a later paragraph, but it is cited here in support of the rule that what can be done under the taxing power can be done under the police power. In this case the Court held that a mortgage on a car used to introduce intoxicating liquor into Indian country does not prevent its forfeiture when illegally used although the mortgagee has no knowledge of the illegal use. The case involves the violation of the act of March 2, 1917, c. 146, 39 Stat. 969, 970 (Comp. St. 1918, 4141*a*), which provides:

> "Automobiles used to introduce intoxicants in the Indian country, whether used by the owner thereof, or other person, shall be subject to seizure and forfeiture."

The court held as follows:

> "If the Government has the broad power of forfeiture, where it is necessary to subserve the public good in the enforcement of the revenue, customs and admiralty laws, it must, I think, be conceded the same power to subserve the public good in the enforcement of the laws against illegal traffic with the Indians."

See, also, Ruling Case Law, vol. 6, p. 193.

If the Federal Government under its taxing power can, without violating the Fifth Amendment, forfeit the interest of an innocent mortgagee in an automobile used to violate the internal revenue law, and if the State can, without violating the Fourteenth Amendment, do anything that the Federal Government can do without violating the Fifth Amendment, it follows that both the Nation and the State under their taxing power can forfeit the interest of an innocent party in an automobile used to violate the tax laws. And if the restrictions of the Constitution on the police power are no greater than on the taxing power, it follows that the State under its police power, without violating the Fourteenth Amendment, can forfeit the interest of innocent parties in automobiles used in violation of law.

Following the correct conclusions in the foregoing decisions, the law of Kansas, which prohibits the transportation of intoxicating liquors from one place to another, and declares automobiles used in violating this law to be common nuisances and provides for their seizure and forfeiture when so used, even to the extent of the interest of innocent parties, is a valid law and does not deprive any person of his property without due process of law, and does not violate the provisions of the Fourteenth Amendment.

d. Statutes similar to the Kansas statute have been held constitutional in State and United States Courts.

The cases cited and discussed under this head hold that the State under its police power, and the Nation under its corresponding power with reference to the care of the Indian and the government of Indian country, may seize, confiscate, condemn and forfeit property which is used in violation of law. And among these are cases holding that in exercising this power the State many provide for the forfeiture of the property of an innocent person when such property is used in violation of law.

The Court in the case of *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep, 273, considered the right of the State to forfeit the property of a person used in violation of the State prohibitory law, but acquired prior to the passage of the law. It was held in that case that the law of Kansas providing that all places where liquor is manufactured, sold and given away unlawfully shall be nuisances, and providing for their abatement and the forfeiture of the property, was not unconstitutional as depriving one of property without due process of law.

The case of *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499, holds that it is within the police power of a State to enforce its legislation for the protection and regulation of its fisheries by enacting laws declaring any nets, pounds, or other devices, being articles of personal property of trifling value, used in violation of law, to be public nuisances, which its game protectors and other persons are authorized to abate and summarily destroy, and such legislation is not within the prohibition against deprivation of property without due process of law. In this case the Court says:

> "The power of the Legislature to declare that which is perfectly innocent itself to be unlawful is beyond question (*People v. West*, 106 N. Y. 293, 12 N. E. 610), and in such case the

> Legislature may annex to the prohibited act all the incidents of a criminal offense, including the destruction of property denounced by it as a public nuisance."

The case of *United States v. One Buick Roadster*, 244 Fed. 961, which case has already been referred to, had under consideration the Federal statute (Comp. St. 4141*a*, 39 St. 1918, 969, 970, Act Mar. 2, 1917, c. 146) which provides that automobiles used to introduce intoxicants into the Indian country "whether used by the owner thereof or other persons" shall be subject to forfeiture. The car in question was used to introduce intoxicants into the Indian country. There was a mortgage on the car. The mortgagee had no knowledge of the illegal use of the car, and claimed that the statute was unconstitutional because it deprived it of its right under its mortgage without due process of law. The Court, as has already been stated, held that the statute was a valid exercise of the governmental power to subserve the public good.

Another case dealing with this same statute, (Comp. St. 4141*a*, 39 St. 969, 970, Act Mar. 2, 1917, c. 146) is the case of *United States v. One Seven-passenger Paige Car*, 259 Fed. 641. The statute provides that automobiles used in introducing intoxicants into Indian territory in violation of law, whether used by the owner or other persons, shall be subject to forfeiture. The Court held in this case that this statute applied to the interest of a mortgagee though the machine is used contrary to the provisions of the mortgage. The Court in its opinion says:

> "If such law violators may encumber such automobiles so as to minimize the actual investment of such introducer the financial hazard of the business is thus reduced. Hence the reason for the terms of the act to include not only automobiles but also to exclude the innocent lienholder from any protection in such forfeiture."

In the case of the *White Auto Company v. Collins*, 136 Ark. 81, 206 S. W. 748, the Arkansas Supreme Court decides that one selling

an automobile on credit, retaining title as security, cannot recover the machine in case it is forfeited to the State on account of its illegal use in the transportation of intoxicating liquor, even though he had no notice that it was used for an unlawful purpose.

In the case of *Robinson Car Co. v. Ratckin*, 104 Neb. 369, 177 N. W. 337, the owner of the car gave a valid mortgage on same to plaintiff. The owner then without plaintiff's knowledge used the car to transport intoxicating liquor contrary to law and the automobile was seized and forfeited by virtue of sec. 21, Laws 1919, ch. 107, which provides:

> "Any car, automobile . . . which shall be used for the unlawful transportation of intoxicating liquors is hereby declared a common nuisance, and there shall be no property rights of any kind in any car, automobile . . . which shall be engaged in or used for the unlawful transportation of intoxicating liquor."

Plaintiff contends that his property is taken without due process of law. The Court in deciding the case, used this language:

> "Whether the necessity exists for such an exercise of the police power as the act provides is a legislative question. The amendment under consideration was enacted for the express purpose of meeting a situation that to the lawmakers appeared to have become intolerable. . . . We conclude that the act provides a valid exercise of the police power, and that it does not contravene the provisions of the fundamental law."

In the case of *Sandlovich v. Hawes*, 113 Neb. 374, 203 N. W. 541, the owner of an automobile rented it to one who, without the knowledge of the owner, used it in transporting intoxicating liquors in violation of law. Section 3274 Compiled Statutes of Nebraska, 1922, provides for the forfeiture of an automobile so used and the court held that under this statute an automobile is subject to forfeiture when the person so using it came into possession of it by consent of the owner, and the innocence of the owner makes no difference.

In the case of *King v. Commonwealth*, 127 Va. 800, 102 S. E. 757, the Court holds that under a statute (Acts 1918, p. 612) which provides that when ardent spirits are being illegally transported in automobiles, the officers shall take possession thereof and the automobile shall be forfeited to the Commonwealth, no exception being made in favor of a creditor having a lien on such automobile, an automobile used in the illegal transportation of ardent spirits will be forfeited although there is a lien upon the automobile for a balance of the purchase price. In this case the Court also holds that the innocence of the owner of any knowledge of the illegal use is no defense to the forfeiture.

In the case of *Pennington et al. v. Commonwealth*, 127 Va. 803, S. E. 758, the owner of an automobile rented it to another for the purpose of delivering goods in the State of Georgia with the express understanding that the car was not to be taken outside the State of Georgia. Without the knowledge of the owner, the car was taken outside of Georgia and into the State of Virginia where it was used for the purpose of transporting intoxicating liquors illegally. In addition to the claim of the owner of the car, an innocent lien holder set up his claim for a lien on the automobile in the amount of the balance of the purchase price. Under the Virginia statute, which provides for the forfeiture of an automobile used in the transportation of intoxicating liquors and which makes no exception in favor of innocent lienholders, the Court held that the innocent owner who had relinquished possession of the automobile to the user had no protection under the statute even though the user retained possession and used the car without authority and in violation of law.

The interpretation given the Kansas statute by the Supreme Court of Kansas is in entire harmony with the decisions of the courts of other states and of the United States, and under these decisions the state is acting entirely within its rights when it declares automobiles

to be common nuisances when used in violation of law and provides for their forfeiture, even to the extent of the interest of an innocent owner who has placed his property in the possession of another for a lawful purpose.

e. The Kansas statute is a necessary and proper exercise of the State's police power and the forfeiture provisions are necessary to prevent the unlawful transportation of intoxicating liquors.

There seems to be no question that the legislature under its police power, when necessary to subserve the public good, can deprive persons of their property without compensation. This proposition we think will be admitted. The controlling question is the question of necessity. The provision of the Kansas law here considered is a necessary provision.

Property of innocent parties cannot be taken by the Federal Government under the taxing power unless it is necessary in order to insure the collection of the tax. The same rule applies to the police power. It would not be right to forfeit the interest of an innocent party in an automobile used to introduce intoxicants into the Indian country unless such proceedings are necessary to prevent the introduction. Congress has felt it necessary to insure the collection of the internal revenue by forfeiting automobiles used to defraud the government of the tax, the forfeiture extending to the interest of innocent parties, and this has been held entirely within the terms of the constitution.

Dobbins Distillery v. U. S., 96 U. S. 395.
U. S. v. Stowell, 133 U. S. 1, 10 Sup. Ct. Rep. 244.
Goldsmith, Jr., Grant Co. v. U. S., 254 U. S. 505, 41 Sup. Ct. Rep. 189.

The Federal Government has found it necessary, in order to prevent the introduction of intoxicating liquors into the Indian country, to forfeit the automobiles used in such introduction, such forfeiture

extending to the interests of those innocent of any such introduction, and this has been upheld by the courts.

U. S. v. One Buick Roadster, 244 Fed. 961.
U. S. v. One Seven-passenger Paige Car, 259 Fed. 641.

The State of Kansas, knowing the difficulty to be encountered in enforcing the prohibition law, found it necessary in order to enforce prohibition to prevent the transportation of liquors from place to place, and in order to effectively prevent such transportation it found it necessary to forfeit the means of transportation, and it then became necessary, in order to make this forfeiture a means of prevention to forfeit not only the interest of the user but all interests in the property, including the interest of the innocent owner who voluntarily places his property in the hands of another. Experience has taught that this is a necessary provision. The history of the legislation shows that in the minds of the framers of the law it was necessary.

State v. Peterson, 107 Kan. 641.

If the forfeiture provisions of the Federal internal revenue and Indian country statutes are necessary and those statutes are constitutional, then the forfeiture provisions of the Kansas statutes are necessary and the Kansas statute is constitutional.

The Supreme Court of the State of Nebraska, in the case of *Robinson Car Co. v. Ratekin*, 104 Neb. 369, 177 N. W. 337, recognizing that necessity, uses the following language:

> "The amendment under consideration was enacted for the express purpose of meeting a situation that to the lawmakers appeared to have become intolerable. The facility with which automobiles and other high-powered means of locomotion, under the control of a single person, untrammeled as to selection of time or route, could be used to transport spirituous liquors unlawfully, made the prohibitory act practically impossible of enforcement. Hence the act in question. We conclude that the

act provides a valid exercise of the police power, and that it does not contravene the provisions of the fundamental law."

It was said in *Lawton v. Steele*, 152 U. S. 140, 14 Sup. Ct. Rep. 502:

"While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed."

It must be assumed that the Eighteenth Amendment, the National Prohibition Act and the State prohibition laws are conducive to the public interests. The provision for preventing the transportation of intoxicating liquors should also be so considered, and in providing for the proper means to accomplish the prevention of transportation a wide discretion in this regard should be allowed the legislature.

The courts should not declare a state law unconstitutional because it is unreasonable and unnecessary, unless it clearly appears that the law is arbitrary and not enacted in good faith.

Yick Wo. v. Hopkins, 118 U. S. 356, 6 Sup. Ct. Rep. 1064.

Powell v. Pennsylvania, 127 U. S. 677, 8 Sup. Ct. Rep. 992.

L'Hote v. New Orleans, 177 U. S. 587, 20 Sup. Ct. Rep. 788.

Cunnius v. Reading School Dist., 198 U. S. 469, 25 Sup. Ct. Rep. 721.

The law of Kansas which prohibits the transportation of intoxicating liquors and forfeits vehicles used for that purpose was enacted in good faith after full investigation and long debate. Its provisions are not arbitrary. Its prohibitions and restrictions apply to all persons in similar situations.

Kansas has for many years prohibited by its laws the traffic in intoxicating liquors. As conditions change the provisions of the laws have changed to meet the changing conditions. It has been

found necessary, if the prohibition law is to be enforced and the public protected from the evils of the liquor traffic, to prevent the transportation of these liquors. It stands out very plainly that if the transportation of intoxicating liquors could be completely prevented the traffic would soon die. The object sought is the stoppage of the traffic. This has been declared by State and nation to be for the public good. The prohibition of transportation of liquors is closely connected with and a great aid to the realization of the main objective. To prevent this transportation would be a great stride toward the desired goal. In order to prevent transportation it is necessary to punish those engaging in the act, and it is further necessary to do away with the facile means of transportation. The automobile facilitates transportation of intoxicating liquor and aids the law violator not only in committing the violation but in making his escape. Wrongfully used it is the greatest aid in violating the law, and thereby becomes the greatest menace to the public good.

f. The rule applies to innocent owners in certain cases, the same as it does to innocent mortgagees, and the automobile of plaintiff in error, who permitted it to be used by another in his general business, was subject to forfeiture when used by such other in transporting intoxicating liquors in violation of law, and the plaintiff in error, having placed the car in the possession of the one who used it unlawfully, cannot complain of the forfeiture.

Plaintiff in error in her assignment of errors and statement of points to be relied upon (R. 27) complains that the court erred (1) in holding that the law of Kansas is constitutional and valid, although depriving the *owner* of an automobile, when the same is used without the knowledge or authority of the owner in the transportation of intoxicating liquor (R. 27 and 28) and (2) in holding that an automobile which the *owner* places in the possession of another for general use and such other uses it in the unlawful trans-

portation of intoxicating liquors without the knowledge of the owner is subject to forfeiture, and (3) in holding that the rule applicable to a guilty automobile in which an innocent third party has a special ownership is equally appropriate to an innocent *owner* who holds the entire interest in the automobile. (R. 28.)

These three statements of complaint involve but one point, and that is whether the Court erred in holding that under the facts of this case the automobile of plaintiff in error could be forfeited. The testimony of Stella Van Oster (R. 15), George M. Hedges (R. 16), Clyde Brown (R. 16), Lee Kemper (R. 16), R. S. Terwilliger (R. 16), and John P. Hughes (R. 16), in the trial of the case is summarized in the opinion of the State Supreme Court as follows (R. 20):

> "In reference to the forfeiture of the car it was shown to be the Dodge car involved in this proceeding, that it was purchased from Sheppard & Hedges by Mrs. Van Oster, the previous year at a price of $950, and that amount was paid except the sum of $100. She testified that she left the car with the vendors for demonstration purposes upon an agreement that they might keep it in their garage, maintain and use it in their business, until they were satisfied that the value of such use amounted to $200, which sum was to be allowed by them to her. Clyde Brown was coöperating with Sheppard & Hedges in the business of selling tractors and cars and he used this car in the business frequently and so often that others thought it to be his own. While Mrs. Van Oster stated that she knew nothing of his use of the car on the day of the arrest, it appears that she saw him driving the car and knew that he used it in his business so many times that she could not state the number. Other testimony showed that Brown took and used the car at will and was driving it on the streets almost continually and some witnesses saw him drive it almost every day. Mrs. Van Oster knew and in fact could not avoid knowing that he was using the car in his business generally and almost continuously. It was not an isolated instance of Brown taking and using the car on the day of his arrest, without the knowledge of Mrs. Van Oster, but was a general use with the permission of the owner for a long period of time."

The holding of the State Court must be considered in the light of the above statement of facts.

This is not a case in which the automobile is stolen from the owner and then illegally used, but is a case in which the owner places the car in the hands of another for a legal purpose and that other then uses the car illegally. That this is the question decided in this case is shown by these words in the opinion of the State Court (R. 20 and 21):

> "We need not determine whether a forfeiture may be adjudged in supposed cases where cars are stolen or taken without any knowledge or permission of the owners. Here there was both knowledge and permission for general use and the case falls within the rule of cases previously decided."

That in such cases vehicles used in the illegal transportation of liquors may be forfeited has been held in cases already cited and discussed in this brief.

Dobbins Distillery v. U. S., 96 U. S. 395.
Goldsmith, Jr., Grant Co. v. U. S., 254 U. S. 505, 41 Sup. Ct. Rep. 189.
U. S. v. Two Bay Mules, 36 Fed. 84.
U. S. v. 220 Patented Machines, 99 Fed. 559.
U. S. v. One Black Horse, 129 Fed. 167.
U. S. v. Mincey, 254 Fed. 287.
Sandlovich v. Hawes, 113 Neb. 374, 203 N. W. 541.

In each of these cases an owner, although innocent of any knowledge of the illegal use of the property, is deprived of his property when it has been used in violation of law by one in whose possession the owner has placed it for a legal purpose. The present case falls within this class and the state court very properly held that the property should be forfeited.

The courts draw no distinction between the forfeiture of the interest on an innocent lienholder and the forfeiture of the property of an owner who has voluntarily placed his property in the hands of another, who without the knowledge or consent of the owner uses the property in violation of law.

g. The cases cited by plaintiff in error, in support of the proposition that the Kansas statute is not a reasonable exercise of the State's police power, and is a violation of the Fourteenth Amendment to the Constitution of the United States, do not sustain that proposition.

The first case cited by plaintiff in error in her brief is the case of the *National Bond and Investment Company v. C. S. Gibson, Sheriff*, 6 Fed., 2d Ser., 288. This is a case decided by the United States District Court for Kansas, First Division, and is now pending in this Court on a writ of error. Judge Pollock, in his opinion in this case, holds that the Kansas statute as interpreted by the Kansas Court is not a proper exercise of the police power of the State and is a violation of the Fourteenth Amendment to the Constitution of the United States. So far as the writer of this brief has been able to find, this is the only case in which a Court of the United States has held that a State statute which provides for the forfeiture of an automobile when used in violation of law, such forfeiture extending to the interest of an innocent mortgagee, is in conflict with the provisions of the Fourteenth Amendment. It seems that Judge Pollock in this case relies largely upon the case of the *Shawnee National Bank v. United States*, 249 Fed. 583, as that case is quoted at length in his opinion. For that reason the attention of this Court is called to the fact that the opinion in the case of the *National Bond and Investment Company v. Gibson* does not correctly quote and interpret the opinion in the case of the *Shawnee National Bank v. the United States*. In the opinion in the National Bond and Investment Company case the Court states that the Court in the Shawnee National Bank case considers the true construction and effect of an act of Congress made for the suppression of traffic in intoxicating liquors among Indians, which provides as follows:

> "That automobiles or any other vehicles or conveyances used in introducing, or attempting to introduce, intoxicants into the

> Indian country, or where the introduction is prohibited by treaty or federal statute, whether used by the owner thereof or other person, shall be subject to seizure, libel, and forfeiture provided in section 2140 of the Revised Statutes of the United States."

The Court then goes on to say:

> "While it will be seen this congressional act, like that of the state involved here, makes no exception of the rights of an innocent chattel mortgagee, yet that court held such an interest was protected by the law from seizure and forfeiture by the government."

It is true that the statute quoted makes no exception of the rights of an innocent chattel mortgagee, and if the language of the opinion in the Shawnee National Bank case could be applied to that statute the conclusion drawn by the Court in the National Bond and Investment Company case would be correct.

The fact is, however, that the Court in the Shawnee National Bank case was not construing the statute above quoted, but was construing section 4141 of the Compiled Statutes of 1916, which reads as follows:

> "If any . . . has reason to suspect or is informed that any white person or Indian is about to introduce or has introduced any spirituous liquor or wine into the Indian country in violation of law, . . . may cause the boats, stores, packages, wagons, sleds and places of deposit of such person to be searched; and if any such liquor is found therein, the same, together with the boats, teams, wagons and sleds used in conveying the same, and also the goods, packages, and peltries of such person, shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one-half to the informer and the other half to the use of the United States."

It will be noted that this statute expressly provides—and the Court so held—for the confiscation only of the property of the wrongful user. The case is decided upon the theory that the language of the statute only forfeits the interest of the person wrong-

fully using the property, and therefore the interest of an innocent mortgagee should be protected.

The statute first above quoted, which the Court quotes in its opinion in the National Bond and Investment case, became law March 2, 1917 (Comp. St. 1918, 4141*a*, 39 St. 969; Act March 2, 1917, 145). The seizure in the Shawnee National Bank case was made on August 22, 1916, and of course the act of March 2, 1917, would have no effect upon the procedure for the forfeiture of the property seized in 1916.

The court in the Shawnee National Bank case, however, in another connection, does quote the 1917 act and referring to the fact that it forfeits property whether used by the owner thereof or other persons, uses this new provision as an argument in establishing the fact that the former statute was intended to provide only for the confiscation of the interest of the user.

The 1917 law, which provides that the property shall be forfeited whether used by the owner thereof or other person, is in that respect similar to the Kansas statute under consideration, and the case of the Shawnee National Bank against United States, which the Court, in the National Bond Investment Company case, relies upon in holding the Kansas statute unconstitutional, is in fact authority for holding the Kansas statute constitutional.

Plaintiff in error in her brief in support of the proposition that the State law, when interpreted to forfeit the interest of an owner when his property is placed in the hands of another for a lawful purpose, and then used by that other for an unlawful purpose, is unconstitutional, cites the case of *Boles v. State*, 77 Okla. 310, and the case of *Hoskins v. State*, 82 Okla. 201, and quotes from the opinions in these cases. The decisions in these cases are based upon the rule announced in the case of *State v. One Super Six Automobile*, 77 Okla. 130. In that case the Court held that the property of an innocent owner was exempt from the operation of the Oklahoma law

(ch. 188, Laws of Oklahoma, 1917), for the reason that in the enactment of the Oklahoma statute it was the intent of the Legislature to exempt from the operation of that law the property of innocent owners. This is not the case in Kansas. The history of the Kansas act as stated in the case of *State v. Peterson*, 107 Kan. 641, shows that the intention of the Legislature was to include the property of innocent mortgagees and innocent owners who permit their property to be used by others.

Plaintiff in error also cites the case of *Naylor v. Simmons*, 33 Idaho, 323, 194 Pac. 94. The statute under consideration in that case (Laws of 1917, ch. 45, sec. 3, Comp. St. 1919, sec. 2646) provides that any automobile used within the State of Idaho with the knowledge of the owner for the purpose of transporting intoxicating liquor shall be declared forfeited. The Court in deciding this case based its decision upon the language of the statute which limits its operation to property used with the knowledge of the owner. This case, of course, differs from the case at bar, for the reason that the Idaho statute by its own terms protects the rights of the owner, while the Kansas statute does not.

Plaintiff in error has cited also the cases of *United States v. Silvester*, 273 Fed. 253, *Jackson v. United States*, 295 Fed. 620, and *Oakland Motor Car Company v. United States*, 295 Fed. 626. All of these cases arose under the National Prohibition Act (Comp. St. 1918, 10138½ mm), and the courts, in holding that the rights of innocent parties should be protected, base their decisions upon the language of the National Prohibition Act which provides such protection. These cases, therefore, are not in point in this case.

The case of the *United States v. One Buick Roadster*, 280 Fed. 517, cited by plaintiff in error in her brief, is a case in which an automobile was used in violation of the revenue laws (3450 R. S., Comp. St. 6352) by one who had no right to the possession of the

car. The court in that case held that the forfeiture provisions of the law should not operate against an owner whose property was seized while in the possession of a trespasser or thief. That case differs from the case at bar for the reason that in the case at bar the owner had permitted her property to be used by the person in whose possession it was when seized.

Plaintiff in error also cites the case of *United States v. Two Barrels of Whisky*, 96 Fed. 479. The Court in this case held that, under section 3450 of the Revised Statutes, 1918, which provides for the forfeiture of a conveyance when used to remove property upon which a tax has been imposed with the intent to defraud the United States of said tax, the rights of an owner who has placed his property in possession of another for a lawful use shall be protected when that other uses the property in violation of the statute. The holding in this case is, however, in conflict with the holding of this court in the case of *Goldsmith-Grant Company v. United States*, 254 U. S. 505, 41 Sup. Ct. Rep. 189.

2. The Kansas Law Is Not in Conflict With the National Prohibition Act.

Plaintiff in error claims that the Kansas law, in so far as it forfeits the interest of innocent parties in automobiles unlawfully used to transport intoxicating liquor, is in conflict with the National Prohibition Act, which protects such interest, and therefore is null and void.

The State law is not in conflict with the National act and the National act does not give plaintiff in error any right of which the Kansas law deprives her. Had her car been seized for a violation of the National act, then she would be entitled to such protection as the terms of that act afford her. Her car was not charged with a violation of the national act, but was charged with being a nuisance un-

der the State law. The forfeiture proceedings are governed by the State law, and that law cannot be said to be in conflict with the National act as long as it tends to enforce the Eighteenth Amendment to the Constitution of the United States.

The State of Kansas has the right under the Eighteenth Amendment and under its police power to pass a law which forfeits the interest of an innocent party in an automobile when the automobile is used unlawfully to transport intoxicating liquors, and such a law is not in conflict with the National Prohibition Act, although by its terms the National act, in providing that automobiles used to transport intoxicating liquors shall be forfeited, also provides that the interest of innocent parties under certain conditions shall be protected. There is no conflict between these two provisions which will invalidate the provisions of the State law.

Under the power granted to it by the Eighteenth Amendment, Congress has provided (Comp. St. 1918, 10138½gmm, Oct. 28, 1919, c. 85, Title II, sec. 26, 41 St. 315) that an automobile used in the unlawful transportation of liquor shall be sold upon conviction of the user, unless good cause to the contrary is shown by the owner, the expenses of sale, costs and so forth, paid and then that valid liens which had been created without the lienor having any notice that the vehicle was being used in the illegal transportation of intoxicating liquors, shall be paid from the remaining proceeds of the sale. This is a part of the National Prohibition Act. Any car seized for a violation of this act is subject to such procedure. That procedure, however, has to do only with the National Prohibition Act. The only right that it grants to lien holders is protection when the car is sold under that act.

The Eighteenth Amendment itself reserves to the States concurrent power to enforce the prohibitions of the amendment by appropriate legislation.

Section 2 of the Eighteenth Amendment provides as follows:

> "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

The State may adopt such laws and such methods of enforcement, subject, of course, to constitutional limitations, as it finds necessary to enforce the prohibitions of the amendment. These State laws may vary from the act of Congress in many respects, it being necessary only that the State law does not conflict with or become repugnant to the amendment. However, the fact that Congress sees fit to protect certain innocent parties when cars used unlawfully are confiscated, does not require the State to do so. The State cannot make legal that which Congress has made illegal, but it can go a step farther and make that illegal which Congress has failed to make illegal. In other words, it may go farther in imposing restrictions than Congress may have gone, and in the provisions of its law which declares an automobile a nuisance when used in the illegal transportation of liquor and confiscate the interest of the owner who has voluntarily placed the property in the hands of the wrongful user, the State has simply gone a step farther in the matter of restrictions, but it has not deprived plaintiff in error in this case of any right or privilege guaranteed to her by the National Prohibition Act. The right granted by the National Prohibition Act is that when a car is seized for a violation of that particular act the rights of innocent parties shall be protected. It extends no farther and has no application whatever to procedure under the State law.

The United States Supreme Court in the case of *Vigiolotti v. Commonwealth of Pennsylvania*, 258 U. S. 403, 42 Sup. Ct. 330, in construing a State law (sec. 15, Act of May 13, 1887, P. L. 108), which prohibited the sale of every spirituous liquor without a license regardless of the percentage of alcohol, says:

> "The Brooks law as construed by the courts of the State prohibits every sale of spirituous liquor without a license ex-

cepting only such sales as are made by druggists, and these are forbidden to sell intoxicating liquors except on prescription of a regular physician. The law applies, however small the percentage of alcohol, and although the liquor is not intoxicating. It applies to liquor sold solely for industrial uses. . . .

"The Brooks law as thus construed does not purport to authorize or sanction anything which the Eighteenth Amendment or the Volstead Act prohibits. And there is nothing in it which conflicts with any provision of either. It is merely an additional instrument which the State supplies in the effort to make prohibition effective. That the State may by appropriate legislation exercise its police power to that end was expressly provided in section 2 of the amendment which declares that Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

The National Prohibition Act has defined intoxicating liquors as those having more than one-half of one per cent alcohol, and virtually has granted the privilege, so far as the National Government is concerned, of selling spirituous beverages with a less per cent of alcohol. The Brooks law above referred to makes it unlawful under stated circumstances to sell spirituous liquor, no matter how small a percentage of alcohol it may have. The Brooks law denies a privilege granted by the Federal law just as much as does the law of Kansas in denying protection to the innocent lien holder or owner, but this Court held that the Brooks law is not in conflict with the Volstead act.

Mr. Chief Justice Taft in the case of *United States v. Lanza*, 260 U. S. 377, 43 Sup. Ct. 141, in commenting upon the concurrent power referred to in the second section of the Eighteenth Amendment, says:

"The second section means that power to take legislative measures to make the policy effective shall exist in Congress in respect to the territorial limits of the United States and at the same time the like powers of the several States within their territorial limits shall not cease to exist. Each State, as also Congress, may exercise an independent judgment in selecting and shaping measures to enforce prohibition. Such as are

adopted in Congress become laws of the United States, and such as are adopted by a State become laws of the State. They may vary in many particulars, including the penalties prescribed, but this is an inseparable incident of independent legislative action in distinct jurisdictions.

"To regard the amendment as the source of the power of the States to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the Federal Constitution, chiefly the commerce clause, each state possessed that power in full measure prior to the amendment, and the probable purpose of declaring a concurrent power to be in the state was to negative any possible inference that in vesting the National Government with the power of country-wide prohibition, State power would be excluded. In effect the second section of the Eighteenth Amendment put an end to restrictions upon the State's power arising out of the Federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits. To be sure, the first section of the amendment took from the States all power to authorize acts falling within its prohibition, but it did not cut down or displace prior State Laws not inconsistent with it. Such laws derive their force, as do all new ones consistent with it, not from this amendment, but from power originally belonging to the States, preserved to them by the Tenth Amendment and now relieved from the restriction heretofore arising out of the Federal Constitution. This is the *ratio decidendi* of our decision in *Vigiolotti v. Pennsylvania*, 258 U. S. 403, 42 Sup. Ct. 330, 66 L. Ed. 686 (April 10, 1922).

"We have here two sovereignties deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other."

The Court in its opinion in the case *Ex Parte Ramsey*, 265 Fed. 950, in holding that the State law (ch. 7736, Laws of Fla), is not

in conflict with the Volstead act because the penalty is more severe, says:

> "While it is true that the Volstead act affixes as the only penalty for the possession of alcoholic liquors the forfeiture of the liquor, and the Florida statute provides a fine or imprisonment, yet such a difference in punishment does not constitute a conflict."

The act of the State of Kansas which provides for the confiscation of cars used in the unlawful transportation of liquor, although it does not protect certain innocent parties, does not tend to defeat the purpose of the Eighteenth Amendment. As a matter of fact it goes further in enforcing the amendment and making it effective than the National Prohibition Act does. The fact that Congress has not seen fit to go as far does not render void the act of the Kansas Legislature.

The rule is that the State has power within its own boundaries to pass such legislation as it finds necessary to carry out the prohibitions of the Eighteenth Amendment, which legislation is not subject to restraint by Federal legislation unless the State law is so utterly in conflict with the Federal law that the two cannot stand together. In order to create such a condition the State law must tend to defeat the purposes of the amendment. In order to constitute a conflict the State law must legalize something prohibited by the amendment itself or by the Federal enforcing legislation.

Shreveport v. Marx, 148 La. 31, 86 So. 602, 11 A. L. R. 1320.
State v. Guathier, 121 Me. 552, 118 Atl. 380, 26 A. L. R. 652.
Commonwealth v. Nickerson, 236 Mass. 281, 128 N. E. 273, 10 A. L. R. 1568.
33 Corpus Juris, 501, 503, 505.

The Kansas law does not impede or hamper the Federal Government in enforcing the prohibitions of the Eighteenth Amendment. The Kansas Legislature felt that it would be more effective to pass

a law which forfeits an automobile used unlawfully than to pass a law which forfeits only the interest of the wrongdoer. But this law does not tend to defeat the amendment or any Federal legislation designed to enforce the amendment. Kansas has passed a law, the effect of which is to prohibit the transportation of intoxicating liquors. The amendment makes it unlawful to transport intoxicating liquors and directs Congress and the State Legislatures to pass such laws as are necessary to prohibit the transportation. Congress felt that to forfeit the interest of the wrongdoer in an automobile used unlawfully would be sufficient. The Kansas legislature, however, felt that such a forfeiture would not be sufficient, and that the automobile which facilitates such transportation and thereby becomes a public nuisance, should be forfeited.

There is no conflict between the national and state laws which would in any manner invalidate the state law.

3. The proceedings against the automobile in this case are not dependent upon or affected by the criminal proceedings against the wrongful user, and the finding of a jury in a criminal prosecution that the driver is not guilty of the charge of illegal transportation of intoxicating liquor, has no effect upon the proceedings in the case against the car. The proceedings against the person in the criminal case and those against the property of plaintiff in error are separate and distinct proceedings between different parties and one does not depend upon the other.

The plaintiff in error complains that the Supreme Court of Kansas erred in overruling her motion for a rehearing and in failing to order a dismissal of this action, basing her complaint upon the fact

that Clyde Brown, the person charged with unlawfully transporting intoxicating liquor in appellant's automobile, was acquitted of the charge by a jury trial and that such acquittal explicitly and finally determined that no crime was committed in the use of said automobile. It will be noted that the proceedings against the automobile had been terminated in the District Court of Finney county and had been appealed to the Supreme Court of the State of Kansas, where the decision of the lower court had been affirmed, before the criminal proceedings against Clyde Brown were heard and before he was acquitted. After the proceedings against the car had been finally determined in the Supreme Court, Clyde Brown, the defendant in the criminal proceedings in the lower court, was acquitted. Plaintiff in error then asked the Kansas Supreme Court to dismiss the proceedings against the automobile.

An examination of the Kansas statutes reveals the fact that the statute under which the forfeiture proceedings are held, does not provide for any criminal proceedings against the person illegally transporting intoxicating liquor. This statute provides for the seizure of the automobile, a hearing to determine whether or not it is a common nuisance and the sale of the car. It is true that the statute provides for the arrest of the user of the automobile, but nowhere does it then provide for further proceedings against the person arrested. The criminal proceedings must therefore be had under the general criminal-procedure statute. The proceeding against the person and the proceeding against the car are separate and distinct and one does not depend upon the other.

Plaintiff in error was not a party to the criminal action which she now claims is a bar to the action against the car. The present action is between the State of Kansas and Stella Van Oster's automobile. The criminal proceeding was an action between the State of Kansas and Clyde Brown. The acquittal of Clyde Brown in his

case cannot be used as a defense by the plaintiff in error in the present case.

33 Corpus Juris, 684.

In the case of *Duncan v. State*, 149 Ga. 195, 99 S. E. 612, the Court considered the question of the admissibility in a condemnation proceeding against certain property of the record of acquittal of a person in a criminal proceeding growing out of the same transaction. In that case the Court said:

> "Generally where the condemnation proceeding is resisted by a third party who makes a claim to the automobile, the record of the acquittal of the defendant in the criminal case would be inadmissible in the trial of the condemnation proceeding. (*Powell v. Wiley*, 125 Ga. 823, 54 S. E. 732; *S. A. L. Railway v. O'Quin*, 124 Ga. 357, 52 S. E. 427, 2 L. R. A., n. s., 472; *Tumlin v. Parrott*, 82 Ga. 735, 9 S. E. 718.)"

In the case of *Regadanz v. State*, 171 Ind. 387; 86 N. E. 449, the Court in considering a statute (8338-8350 Burns 1908, Acts 1907, p. 27, secs. 2-14) which provides that any person who shall operate a place where intoxicating liquors are sold in violation of the law shall be deemed guilty of a misdemeanor, and which provides for the seizure and destruction of intoxicating liquors, holds that the liquors may be proceeded against and destroyed, and the proceedings for such seizure and destruction are entirely separate from the proceedings against the person charged with operating the place, and in so holding states:

> "The legislative scheme being as indicated, it results that the proceedings, civil and criminal, provided for by the act are separate and may be instituted at different times and before different courts. It therefore follows that authority to order the destruction of the property is not an adjunct of the power to determine the guilt or the innocence of the possessor."

In the case of *Sanders v. The State of Iowa*, 2 Ia. 230, 278, the Court in considering a statute (Act for Suppression of Intemperance,

Jan. 22, 1855) which makes the keeping of liquors for sale an offense, and also makes liquors kept for sale a nuisance, holds that the proceeding against the person keeping the liquors for sale and the nuisance proceedings against the liquors are separate and distinct actions, not dependent upon each other.

In the case of *State v. Learned*, 47 Me. 426, the Court construes a statute of the State of Maine (Laws of 1858, c. 33) which makes it an offense to have intoxicating liquors in possession with the intent to sell or with the intent that same shall be sold, and which also provides that such liquors kept and deposited may be proceeded against *in rem*, and upon due proof may be forfeited and confiscated. The Court holds that the proceedings to forfeit the liquor under this statute are separate and distinct from the proceedings against one having the same in possession, and indicates that the proceedings to forfeit are not dependent upon a conviction under the proceedings against the person.

The Court in the case of *State v. Miller*, 48 Me. 576, holds that when an officer seizes intoxicating liquors upon a warrant issued therefor under a statute which authorizes the seizure of the liquors and the arrest of the person in whose custody they are alleged to be (Laws of 1858, c. 33), the officer is then required to arrest the person and to take both the person and the liquors before the magistrate; but at this point the proceedings are divided and constitute two distinct cases. The person is put on trial for having had such liquors in his possession with intent to sell the same, and the liquors are libeled as intended for sale, "whether by one person or another it is immaterial," and in this connection the Court states:

> "That the acquittal of the person does not entitle him to a restoration of the liquors, nor does a condemnation of the liquors necessarily result in a conviction of the person. The two cases are entirely different."

In the case of *State of Maine v. Cornelius McCann*, 61 Me. 116, the defendant was on trial for having intoxicating liquors in his possession and intended for sale. The jury found the defendant guilty and the defendant objected to the finding of the jury for the reason that, as he claims, the proceeding should have been solely *in rem*, and inasmuch as the liquors were seized without a warrant the seizure was illegal and his conviction should be set aside. The Court in overruling his objection, held that:

> "The proceedings originally were against the person and the thing. A severance is made by law, and in the proceedings against the person it is immaterial what has been done with the thing."

The case of *State v. Certain Intoxicating Liquors*, 53 Utah, 171, was an action brought against certain intoxicating liquors under the provisions of chap. 2, Laws of Utah, 1917, prohibiting and regulating the sale, manufacture, use, possession, etc., of intoxicating liquors within the State. This statute also provides for the search for and seizure of intoxicating liquors which are held for an illegal purpose, and further provides for the forfeiture of said liquors. As a defense against the forfeiture of the liquors seized under the above statute, the defendant alleged that he had once been acquitted of the charge of the possession of such liquors in the municipal court of Ogden City and that such acquittal was a bar to the prosecution against the liquors. The Court held that such was not the case; that the acquittal of the defendant had no bearing on the issues. In this case, as stated, the Court held that the proceedings against the person and against the forfeited property are separate, and one is not dependent upon the other.

And so in the present case the Kansas Court very properly refused to dismiss the case against the car although the person charged in the criminal case with the transportation of liquors was found not guilty. Especially is this true in view of the fact that the case

came before the Supreme Court on appeal for the purpose only of reviewing the proceedings in the lower court. The question of the effect of a finding of not guilty in the criminal case naturally was not considered by the trial Court, and therefore the State Supreme Court could not consider it. All that was before the State Supreme Court was a question of error in the trial Court. The questions presented in the forfeiture proceedings against the car had been decided long before Clyde Brown was acquitted in the criminal proceedings. His acquittal was not pleaded as a defense in the car case. No error on the part of the trial Court is based upon the refusal to recognize the acquittal. But plaintiff in error, who was not a party to the criminal proceedings, at the very last moment asked the reviewing Court to dismiss the car case after it had been tried and reviewed on appeal. The question was not properly before the State Supreme Court and that court's refusal to dismiss the proceedings in this case should not be urged here.

4. The testimony of officers of experience that they found liquor, smelled it, and from its appearance and smell it was intoxicating, was properly admitted by the trial Court.

Plaintiff in error complains because the Kansas Supreme Court held that the trial Court properly admitted evidence of officers of experience who found the liquor transported, and determined by the sense of smell and from its appearance that it was strong intoxicating liquor. Plaintiff in error claims that these witnesses were not qualified to testify that the liquor was intoxicating, and that the admission of this testimony was error. In connection with this complaint of plaintiff in error the testimony of the police officers as to the intoxicating quality of the liquors should be considered together with all of the circumstances in the case in determining whether or not

the State Supreme Court erred in its holding. Also consideration should be given to everything the State Court had to say upon the point in issue, and not only the statement set out in the assignment of errors.

The sheriff of Finney county, Ol. Brown, testified that the bottle contained "about a pint of liquor" (R. 6); that he would swear it is intoxicating liquor (R. 7); that he can tell intoxicating liquor by the smell (R. 7). Mr. Lee Richardson, a deputy sheriff, testified that he saw Brown throw a small bottle out of the front of the car, and that the bottle was full of liquor (R. 7); that the liquor was intoxicating liquor (R. 8); that he knows it was intoxicating liquor from his past experience in smelling it (R. 8); that he knew it had alcohol in it (R. 8); that it smells like liquor strong (R. 8); that he knows from the smell and appearance (R. 8).

The above testimony of these officers should be considered in connection with the testimony of Ol. Brown, that on the day in question he had been watching the defendant, Clyde Brown, and saw him stop his car, the Dodge in question, a little way out, northeast of Garden City, Kan., at a point where he later found a jug of liquor (R. 14); that he followed the Dodge car into town and arrested Clyde Brown; and the testimony of Lee Richardson, the deputy sheriff, that he was with the sheriff, and that they drove around Clyde Brown's car and commanded him to stop, and that he did not stop until they had driven about a half a block from the point where he first commanded him to stop; that he saw Clyde Brown throw a bottle of liquor out of the car; that he went back and picked it up and that it was full of intoxicating liquor (R. 15); that Clyde Brown said he was just trying to get ahead a little bit; that his doctor bills were not paid yet (R. 15).

This testimony fully justified the trial Court in finding that the car had been used for transporting intoxicating liquor and sustains

the Kansas Supreme Court in the following statement of facts in its opinion (R. 19):

> "The first contention of Mrs. Van Oster is that there was no proof offered to show that there was liquor in the car nor that the bottle of liquor which Brown is said to have thrown from the car just before his arrest was in fact intoxicating. There is testimony that the officers acting upon the theory that he was transporting intoxicating liquors in the car pursued and caught up with him, whereupon they forced the car he was driving into the curb and stopped him. An officer testified that after Brown was ordered to stop he was seen to throw a bottle from the car about fifteen steps from where he finally did stop and that upon a search of the place, the bottle was found and that it contained strong intoxicating liquor. One of the officers testified that the grounds of their suspicion was that they had seen Brown stop at a place a short distance out of Garden City, and on visiting the place they found a jug of booze at the place where Brown had stopped. Afterwards they pursued him and found no liquor in the car, but did find the bottle which he was seen to throw from the car about the time they caught up with him.' That bottle contained about a pint of liquid, and upon examination the officers stated that it was intoxicating. While it was not tested by a chemist nor did the officers taste it, it was tested by their sense of smell and from the odor and appearance they did not hesitate to testify that it was strong intoxicating liquor. The evidence was proper and sufficient to establish its quality, and besides it appears that the bottle of liquor which Brown threw from the car just before his arrest was introduced in evidence."

The Courts in other States have held that evidence very similar to that in the case at bar is competent to prove the intoxicating quality of liquors. Witnesses have been permitted to testify that beverages looked like whisky; that certain beverages tasted or smelt like whisky; that from their experience as police officers they knew certain beverages were intoxicating. In none of these cases was a chemical examination made or any proof offered as to the alcoholic content.

Strange v. State, 5 Ala. 164, 59 Southern, 691.
Borders v. City of Macon, 18 Ga. App. 333, 90 S. E. 989.
Rush v. Commonwealth, 20 Ky. Law. Rep. 775, 47 S. W. 585.
Commonwealth v. Joseph Leo, 18 Mass. 110.
Commonwealth v. John Dawdican, 114 Mass. 257.
State v. Drew, 38 Vt. 387.

The sheriff and the deputy sheriff in the case at bar testified definitely that the liquor which was in the bottle thrown from the car was intoxicating liquor. On cross-examination they testified that their opinion was based upon its appearance and its smell. The liquor was introduced in evidence and was before the Court. The positive testimony of these witnesses is admissible in this case, and, when considered in connection with all of the testimony, leaves no doubt in any one's mind but that the liquor transported was of a kind the transportation of which is prohibited by the Kansas statute.

5. The fact that a jury trial is not provided by the Kansas act does not make the act unconstitutional and void.

Plaintiff in error in her brief raises the question of her right to a jury trial. The printed transcript of record is silent on this point. It is not referred to in the assignments of error (R. 23) nor in the points to be relied upon (R. 27). The record does not disclose whether or not the question was presented to the State Court. At any rate the question was not mentioned in the opinion of the State Court. (R. 18.) It should not be presented here and now.

Plaintiff in error claims that sec. 3, chapter 217, Laws of Kansas, 1919, which provides for a summary hearing before the court, is unconstitutional and void because it does not provide for a jury trial, and therefore is in violation, first, of section 5 of the Bill of Rights of the Kansas Constitution, and second, of the Seventh Amendment to the Constitution of the United States.

The Seventh Amendment to the Constitution of the United States is a restriction upon the Federal Government and does not affect process under state laws, and therefore it has no effect upon the proceedings in this case.

Ellenbecker v. District Court, 134 U. S. 31, 33 L. Ed. 801, 10 Sup. Ct. Rep. 424.

State of Ohio, ex rel., v. Dollison, 194 U. S. 447, 48 L. Ed. 1062.

Although the question of the rights of plaintiff in error under section 5 of the Bill of Rights of the Kansas Constitution is not referred to in the opinion of the State Court in this case, yet the Kansas Supreme Court has decided, in the case of *State v. Lee*, 113 Kan. 462, that the statute in question is not a violation of section 5 of the Bill of Rights of the State Constitution, and we believe this court under the rule will accept that construction.

Fairfield v. Gallatin, 100 U. S. 47, 25 L. Ed. 544.

The court in its opinion in the case of *State v. Lee*, supra, cites numerous authorities in support of the following propositions which it relies upon in its decision: That the proceeding under the Kansas statute is a special statutory proceeding and that the constitutional guarantee that the right of trial by jury shall be inviolate has no application to proceedings of this character; that the Legislature has the power to declare places where liquor is sold contrary to law to be common nuisances and to provide for their abatement; that the Legislature has the right to provide remedies summary in their nature to prevent and abate nuisances; that these summary remedies are not rendered unconstitutional by reason of the fact that they deprive the defendant of those rights under the Constitution to which ordinarily he is entitled.

Mugler v. Kansas, 123 U. S. 623.
Lawton v. Steele, 152 U. S. 133, 38 L. Ed. 385.
Ellenbecker v. Plymouth County, 134 U. S. 31, 33 L. Ed. 801.
Ex Parte Keller, 45 S. C. 537, 31 L. R. A. 678.

The same rule under similar statutes has been followed by the Courts of other states.

State v. Intoxicating Liquors, 55 Vt. 82.
State v. Intoxicating Liquors, 82 Vt. 287, 73 Atl. 586.
Campbell v. State, 171 Ind. 702, 87 N. E. 212.
State v. Kelly, 57 Mont. 123, 187 Pac. 637.

Plaintiff in error cannot complain that the statute as interpreted by the State Court in denying a trial by jury is depriving her of her property without due process of law, as it is well settled that due process of law does not necessarily include a jury trial.

Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678.
French v. Barber Asphalt Paving Co., 181 U. S. 324, 21 Sup. Ct. Rep. 625, 45 L. Ed. 879.

In this case plaintiff in error had notice that her car had been seized and that a hearing would be had to determine whether or not the car should be forfeited as a common nuisance. She answered and was represented in the hearing of the case. The forfeiture of her property was only declared after it had been determined by the court that the property constituted a nuisance. The denial of the jury trial therefore was not a violation of the due process clause of the Constitution of the United States.

6. The seizure of the property in this case was not unreasonable.

Another point discussed by plaintiff in error in her brief which is not included in the assignments of error (R. 23) or in the points to be relied upon (R. 27), is that her property was seized without a warrant and that the seizure violated her constitutional right against unreasonable search and seizure. This point was not decided by the State Court (R. 18), and the State believes that this Court should not now be asked to consider it.

Plaintiff in error contends that the seizure of her property was in

violation of the Fourth Amendment to the Constitution of the United States. This amendment has to do only with seizures by Federal officers and does not in any way affect seizures made by State officers under State laws.

Ellenbecker v. District Court, 134 U. S. 31, L. Ed. 801, 10 Sup. Ct. Rep. 424.

State of Ohio, ex rel., v. Dollison, 194 U. S. 447, 48 L. Ed. 1062

Plaintiff in error in her brief does not claim that the State Constitution was violated in this respect, although it contains a section which protects the citizens of the State of Kansas against unreasonable search and seizure. (Sec. 15 Bill of Rights Const. of Kansas.) This Court should not be asked to construe the section of the State Constitution as applied to the facts in this case when the State Court has not been given an opportunity to do so. If the State Court had passed upon this point and it was then claimed that the statute as construed by the State Court deprived plaintiff in error of some protection afforded by the Federal Constitution, the Court then very properly could be asked to pass upon the question presented.* Even then, however, counsel for the State of Kansas believe the question could come before this Court only with relation to the due process clause of the Fourteenth Amendment to the Constitution of the United States, and we do not believe that this Court would hold that the manner in which the property of plaintiff in error was seized would be a deprivation of property without due process of law. Before the property was declared forfeited she had notice of the seizure and the hearing, was represented in Court, and the property was not declared forfeited until the Court after hearing the evidence offered by the State and by plaintiff in error declared the property to be a common nuisance.

The seizure of the car in question without a warrant was not an unreasonable seizure. The officers had been following the car for some distance and when they came into the town of Garden City

the officers attempted to stop the car. (R. 6.) This they were not able to do except by crowding the driver to the curb. (R. 6.) The driver before coming to a stop threw a bottle from the car, which bottle was found to contain intoxicating liquor. (R. 7.) It was then that the car was seized. The officers, having seen the bottle thrown from the car, had direct information that the car was being used in violation of the law. It would be unreasonable to require them to allow the driver and the car to proceed on their way until such time as an information could be filed and a warrant issued. By that time the driver and car would both be well out of reach of the officers and the purpose of the law would be thwarted. Such a procedure would be unreasonable. The seizure of the car under the circumstances was reasonable and, as stated above, plaintiff in error was not deprived of her property without due process of law. Before the car was forfeited she had notice of the seizure and of the hearing to be had, and in addition she appeared in the hearing and presented her evidence. Her property was not taken from her until the Court had found that under the laws of Kansas it constituted a common nuisance and should be forfeited.

The State Court did not pass upon this question, but had it done so and determined that the seizure under the circumstances was reasonable, its decision would have been in harmony with the decisions of other Courts.

In this connection the decision of this Court in the case of *Carroll et al. v. The United States*, 267 U. S. 132, 69 Law Ed. 543, is of interest. Although that case deals with a search and seizure under the National Prohibition Act, and that search and seizure is attacked as a violation of the Fourth Amendment, yet the principles governing that case are the same as the principles governing the present case in so far as the question of search and seizure is concerned. This case is a comparatively recent case and needs no extended dis-

cussion in this brief. The Court held that the Fourth Amendment does not denounce all searches and seizures, but only such as are unreasonable, and that an officer before seizing an automobile should have reasonable or probable cause for believing that the automobile was being used in violation of law, and that if he does have such reasonable or probable cause he may seize the automobile without a warrant. The search and seizure in the case at bar, if governed by the principles of the Carroll case, would seem to be a reasonable search and seizure. The officers had reasonable and probable cause for believing that the automobile which they stopped and seized was being used for the purpose of transporting intoxicating liquor in violation of law.

The court in the case of the *United States v. Bateman*, 278 Fed. 231, states its conclusion that if an automobile could not be seized without a search warrant it could not be seized at all, for the reason that in order to have a search warrant issued an information would have to be filed and sworn to positively. By the time that such information could be prepared and warrant issued the automobile would be out of reach.

Unreasonable searches and seizures are prohibited. Reasonable searches and seizures are permitted.

McBride v. U. S., 284 Fed. 416.
Vachina v. U. S., 283 Fed. 35.
United States v. Borkowski, 268 Fed. 408.
Lambert v. United States, 282 Fed. 413.
O'Conner v. United States, 281 Fed. 396.
United States v. Kaplan, 286 Fed. Rep. 936, 972, 973.
United States v. Murphy, 264 Fed. 842.
Ex parte Harvell, 267 Fed. 997.
Kathriner v. United States, 276 Fed. 808.
Elrod v. Mass., 278 Fed. 123.
In re Mobile, 278 Fed. 949.
United States v. Hilsinger, 284 Fed. 585.
United States v. Rembert, 284 Fed. 996.
Bell v. United States, 285 Fed. 145.
United States v. Daison, 288 Fed. 199.

CONCLUSION.

The seizure and forfeiture of the car in this case and the action of the Court in interpreting the forfeiture clause of the State statute to include the property of one who has placed it in the hands of another for a legal purpose, which other uses it unlawfully without the consent or knowledge of the owner, did not deprive plaintiff in error of her property without due process of law, did not constitute an unreasonable exercise of the State's police power, and did not violate the provisions of the Fourteenth Amendment to the Constitution of the United States. Such action did not deprive plaintiff of a right conferred by the National Prohibition Act. The acquittal of the user in the criminal proceedings did not entitle plaintiff in error to a dismissal of the action against the car. The testimony of the officers as to the quality of the liquor was competent and properly admitted. A trial by a jury in such case is not required by the Constitution. The seizure of the car was a reasonable seizure.

Therefore the judgment of the Supreme Court of the State of Kansas should be affirmed.

Respectfully submitted.

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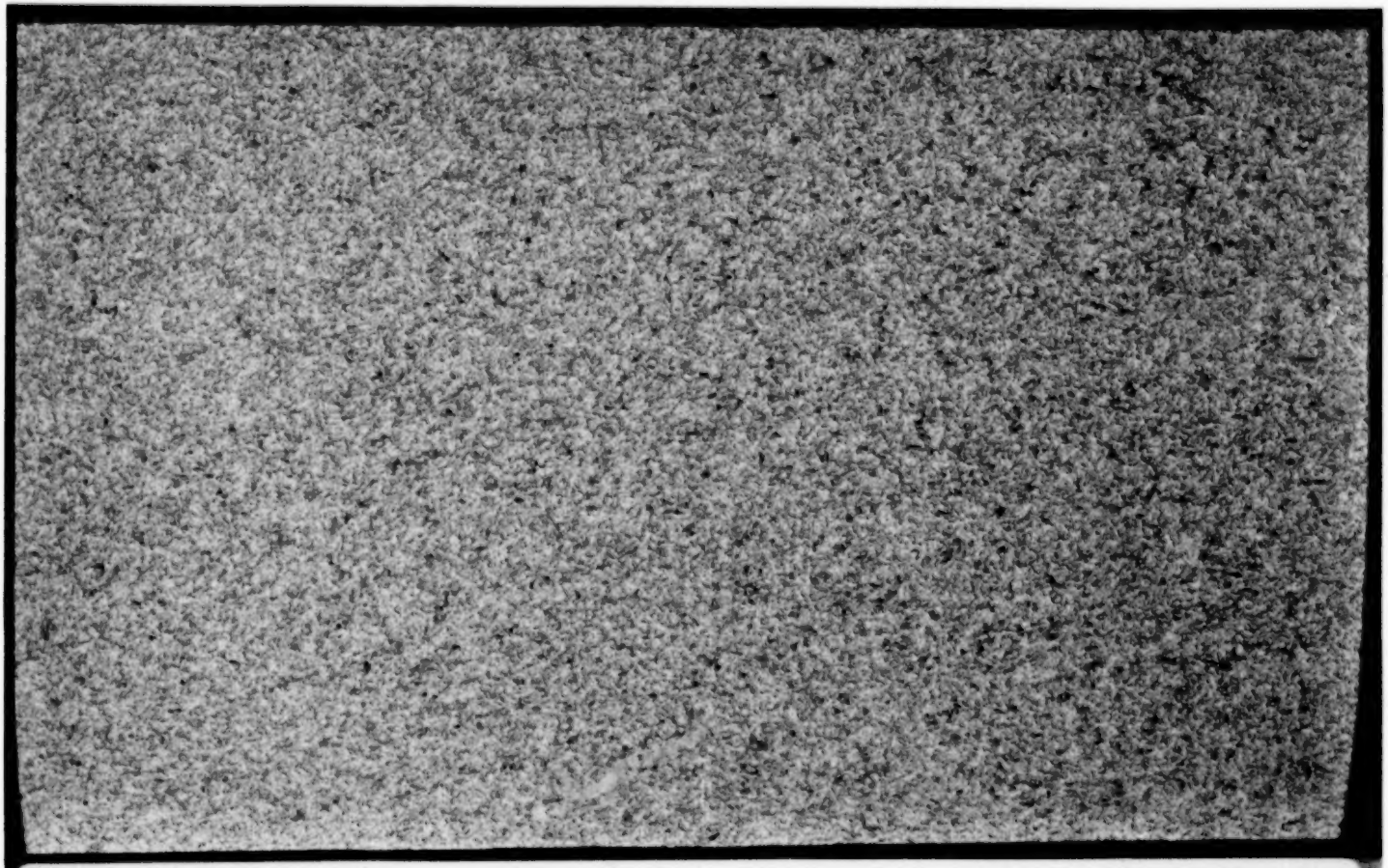

SUPREME COURT OF THE UNITED STATES.

No. 303.—October Term, 1926.

Stella Van Oster, Plaintiff in Error, *vs.* The State of Kansas. } In Error to the Supreme Court of the State of Kansas.

[November 22, 1926.]

Mr. Justice Stone delivered the opinion of the Court.

Plaintiff in error purchased an automobile of local dealers in Finney County, Kansas, agreeing, as part consideration for the sale, to its retention by the vendors for use in their business. Clyde Brown, an associate of the dealers, was permitted by them, with the knowledge of plaintiff in error, to make frequent use of the automobile. Brown was arrested by state officers and an information was filed charging that he used an automobile (which was plaintiff's) for the illegal transportation of intoxicating liquor and seeking its forfeiture and sale as a common nuisance under the Kansas statute. Laws of Kansas, 1919, c. 217, §§ 1-5; §§ 21-2162 to 21-2167 R. S. Plaintiff intervened, denying the allegations of the information and setting up her ownership of the automobile and that the transportation of intoxicating liquor, if any, was without her knowledge or authority.

A trial by the District Court of Finney County without a jury, as provided by the Kansas statute, resulted in a judgment of forfeiture. This determination was affirmed on appeal to the Supreme Court of Kansas, *State* v. *Van Oster*, 119 Kans. 874. After this decision, but prior to a petition for rehearing subsequently denied, Brown was acquitted by a jury of the offense charged in the information. The case comes here on writ of error, Jud. Code, 237(a), as amended.

The Kansas statute, cited above, declares that an automobile or other vehicle used in the state in the transportation of intoxicating liquor is a common nuisance and establishes a procedure followed in this case for its forfeiture and sale. The Kansas Supreme Court

in this, as in other cases, *State* v. *Peterson*, 107 Kans. 641; *State* v. *Stephens*, 109 Kans. 254, has construed this act as authorizing the forfeiture of the interest of an innocent owner or lienor in property entrusted to the wrongdoer.

It is contended that the statute as interpreted denies the due process of law guaranteed by the Fourteenth Amendment. The statute is further assailed on the ground that it is repugnant to the provisions of the National Prohibition Act which covers the same field, and finally, objection is made that evidence of the intoxicating character of the liquor transported was lacking, and that the acquittal of Brown establishes beyond contradiction that no crime was committed.

It is not questioned that a state in the exercise of its police power may forfeit property used by its owner in violation of state laws prohibiting the liquor traffic, *Kidd* v. *Pearson*, 128 U. S. 1, cf. *Mugler* v. *Kansas*, 123 U. S. 623, 671, *et seq.*; *Lawton* v. *Steele*, 152 U. S. 133. It is unnecessary for us to inquire whether the police power of the state extends to the confiscation of the property of innocent persons appropriated and used by the law breaker without the owner's consent, for here the offense of unlawful transportation was committed by one entrusted by the owner with the possession and use of the offending vehicle.

It is not unknown or indeed uncommon for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it. Much of the jurisdiction in admiralty, so much of the statute and common law of liens as enables a mere bailee to subject the bailed property to a lien, the power of a vendor of chattels in possession to sell and convey good title to a stranger, are familiar examples. They have their counterpart in legislation imposing liability on owners of vehicles for the negligent operation by those entrusted with their use, regardless of a master-servant relation. Laws of New York, 1924, c. 534; Michigan Pub. Acts, 1915; Act No. 302, § 29 (constitutionality upheld, *Stapleton* v. *Independent Brewing Co.*, 198 Mich. 170). They suggest that certain uses of property may be regarded so undesirable that the owner surrenders his control at his peril. The law thus builds a secondary defense against a forbidden use and precludes evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner. So here the legislature, to effect a purpose clearly within

its power, has adopted a device consonant with recognized principles and therefore within the limits of due process.

It has long been settled that statutory forfeitures of property entrusted by the innocent owner or lienor to another who uses it in violation of the revenue laws of the United States is not a violation of the due process clause of the Fifth Amendment. *Goldsmith-Grant Co.* v. *United States*, 254 U. S. 505; *Dobbins Distillery* v. *United States*, 96 U. S. 395; *United States* v. *Stowell*, 133 U. S. 1; *United States* v. *Mincey*, 254 Fed. 287; *Logan* v. *United States*, 260 Fed. 746; *United States* v. *One Saxon Automobile*, 257 Fed. 251; *United States* v. *246½ Pounds of Tobacco*, 103 Fed. 791; *United States* v. *220 Patented Machines*, 99 Fed. 559; but cf. *National Bond & Investment Co.* v. *Gibson*, 6 Fed. (2d) 288. A like principle has been applied to the unlawful introduction of liquor into Indian territory in violation of § 2140 R. S., *United States* v. *One Buick Roadster Automobile*, 244 Fed. 961; *United States* v. *One Seven Passenger Paige Car*, 259 Fed. 641.

We do not perceive any valid distinction between the application of the Fourteenth Amendment to the exercise of the police power of a state in this particular field and the application of the Fifth Amendment to the similar exercise of the taxing power by the federal government, or any reason for holding that the one is not as plenary as the other. See *Hibben* v. *Smith*, 191 U. S. 310, 325, *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 410, and see *Kidd* v. *Pearson*, *supra*, at p. 26, upholding the police power of a state to destroy property used in the unlawful manufacture of liquor, on the authority of *Coe* v. *Errol*, 116 U. S. 517, a tax case.

The mere fact that the statute now in question has a broader scope than § 26 of the National Prohibition Act, authorizing confiscation of vehicles used in unlawful transportation of liquor, does not affect its validity. In *Herbert* v. *State of Louisiana*, 272 U. S. —, decided this term, it was held that the same transaction may constitute separate offenses against both state and federal sovereignties, and that in separate prosecutions the statutes of that sovereignty under whose auspices the proceedings are instituted are alone to be applied. Cf. *United States* v. *Lanza*, 260 U. S. 377; *Vigliotti* v. *Pennsylvania*, 258 U. S. 403.

The other questions raised by the record as to the sufficiency of the evidence and the effect of the acquittal of Brown on his separate

trial, at most involved questions of state procedure only as to which the decision of the state court is controlling. No tenable ground for attacking the constitutionality of the determination is suggested. In the brief and on the argument an attempt was made to question the constitutionality of the provisions of this statute dispensing with a jury trial in the forfeiture proceeding. But the record does not indicate that a jury trial was demanded and the question is not raised by the assignments of error. In any case the objection is unsubstantial. *Missouri ex rel. Hurwitz* v. *North*, 271 U. S. 40; *Hurtado* v. *California*, 110 U. S. 516; *Walker* v. *Sauvinet*, 92 U. S. 90; *Kennard* v. *Louisiana ex rel. Morgan*, 92 U. S. 480.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court. U. S.